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The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants

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THE CORPORATE ATTORNEY–CLIENT PRIVILEGE: THIRD-RATE DOCTRINE FOR THIRD-PARTY CONSULTANTS

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ABSTRACT:

Due to the increasingly complex legal landscape, lawyers often rely on information and guidance from non-lawyer consultants such as accountants, investment bankers, and public relations specialists to provide fully informed legal advice to their corporate clients. Currently, however, there is little agreement among federal courts on the appropriate standard to analyze the attorney–client privilege when lawyers' communications involve third-party consultants. Moreover, at the margins, third-party attorney–client privilege doctrine is both overly broad and overly narrow. The narrow interpretation shields third-party communications in the rarest of situations, for example, when the consultant is acting solely as an interpreter. The broadest interpretation protects communications whenever they help the lawyer provide legal advice at the expense of the public's access to information. Thus, the doctrine protects communications that even those in favor of a robust corporate attorney–client privilege would not approve and denies protection in the very contexts for which the doctrine was created.

This Article examines when communications with third-party consultations should be protected. It is informed, in part, by some empirical research the author conducted on attorneys' communications with external public-relations consultants. It argues that exchanges between attorneys and third-party consultants should be protected in certain circumstances. As a means to achieve that protection, this Article recommends that the attorney–client privilege protect these exchanges when there is a strong nexus between the consultant's service and the legal advice provided to the client. It proposes that the proponent show that communication with the third party was necessary to provide legal advice or services. To guard against the use of attorneys as shields for non-privileged communications and to help the court determine that the primary purpose of the exchange

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was for legal (as opposed to business) advice, it proposes that courts also take into account: (1) whether the lawyers were not skilled in the area in which they sought expert assistance; (2) the way the communication was conducted or distributed; (3) contemporaneous documentary support; and (4) the substance of the law involved. Unlike the narrowest standard, this multifactored nexus test embraces the role third-party consultation plays in the provision of legal advice to large corporations. Unlike the broadest standard, this test prevents the ease with which corporations can funnel communications with third-party consultants that are unrelated to legal services through their attorneys for protection. Further, these recommendations simplify the current doctrine and make it slightly more predictable.

TABLE OF CONTENTS

INTRODUCTION

A large publicly traded company releases an FDA approved drug into the marketplace. One year later, it becomes apparent that the drug is causing negative side effects in users. The Chief Executive Officer (CEO) wants a recommendation from the General Counsel about how best to limit legal liability and damage to the company's reputation. The General Counsel meets with the company's outside litigator, the internal Director of Public Relations, and an external public–relations consultant (the drug-recall crisis team) to strategize about if, when, and how the drug should be pulled from the market or modified and what type of statements the company can, should, or must make. They discuss the possible impact various legal responses might have on the public and government officials, the company's negotiation power, and the potential jury pool. Having overseen the clinical trials conducted by external scientists, the General Counsel shares the studies (which had previously been disseminated in the exact form to other members of the company) with the entire drug-recall crisis team. The external public relations (PR) consultant takes notes during the meeting.

As requested by the General Counsel, the external and internal PR consultants prepare two documents. One analyzes the potential reaction by the public and the government to various scenarios including pulling the drug, modifying the drug, and admitting or denying knowledge. Another provides a recommendation on the best media response from a reputational standpoint. These documents together suggest that quick action along with contrition and admission is the best route. The General Counsel ultimately recommends to the CEO that the company pull the drug from the market, admit to knowing some of the adverse side effects, but explain that most had been disclosed in the drug's FDA-approved labeling. The PR executives draft a proposed press release about the recall. The General Counsel

and the outside attorneys look it over and make some suggested changes in writing on the draft. The draft press release is revised and then issued.

After the company recalls the drug, its earnings are substantially below original forecasts for that fiscal period. Consumers and stockholders file separate class actions against the corporation.[1]

In general terms, this is a common scenario for large corporations today. They rely on a multidisciplinary web of services to conduct business in this increasingly complex, international marketplace.[2] They routinely utilize outside professional advisors such as accountants, investment bankers, PR specialists, and other types of professional consultants.[3] Moreover, in order to provide fully informed, competent legal advice and services to their corporate clients, inside and outside lawyers have to understand the business consequences. As a result, they often consult with third-party professional consultants.[4] For example, a lawyer's advice to a corporate client about compliance with SEC disclosure rules or the viability of a possible restructuring may depend on information from a professional accountant about the company's financial situation or potential tax implications. Similarly, a company may need the expertise of bankruptcy liquidation consultants to manage the administration of a sale of a subsidiary. Or, as in the drug-recall scenario, a lawyer may need the expertise of a PR consultant about the potential spin of a legal issue in order to advise the client to settle or pursue a certain defense strategy.[5] Thus, in today's litigious, regulated, complicated world, lawyers sometimes have to look outside the box to form legal opinions.

However, it is unclear which communications between lawyers, clients, and third-party professional, strategic consultants,[6] if any, will be protected by the attorney–client privilege or some other privilege doctrine. For example, in the drug-recall hypothetical described at the beginning of this Article, it is not clear if the attorney–client privilege will be considered waived because confidential client information was shared with the external PR consultant. It is also unclear if the drug trials, the draft press release, the notes taken by the external PR consultants, or the documents

1. This drug-recall hypothetical is loosely based on *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657-L, 2007 U.S. Dist. LEXIS 23164 (E.D. La. Mar. 5, 2007).

2. John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 464 (1982). *See infra* Part I.

3. *See infra* Part I.

4. *Id.*; *see also In re* Tri-State Outdoor Media Group, Inc., 283 B.R. 358, 362 (Bankr. M.D. Ga. 2002).

5. *See infra* note 36.

6. This Article focuses on professional, strategic business consultants, not other types of professionals that refer to themselves as consultants such as IT consultants or other types of third parties potentially covered by the attorney–client privilege doctrine (for example, secretaries or family members). In this Article, public relations consultants are used as one example of the many types of third-party consultants that lawyers rely on in providing legal advice. In a separate article, attorneys' interactions with public relations consultants are more thoroughly explored. *See generally* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion Part I: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374595# [hereinafter Beardslee, *Advocacy Part I*].

prepared for the General Counsel by the internal and external PR consultant will be protected. This is because there is little agreement among federal (and state) courts on the appropriate standard used to analyze the attorney–client privilege when inside or outside attorneys communicate with external third-party consultants generally. [7]

Although the attorney–client privilege does not apply or is waived when communications are exposed to third-party consultants, there are two general exceptions. The attorney–client privilege can protect communications between attorneys and third-party consultants when the third party is: (1) the agent of the attorney or client; or (2) the "functional equivalent" of the client's employees. With respect to the agency exception, two extreme approaches have emerged. Under the narrow approach, courts protect communications with third-party consultants when the consultants merely translate client information. Under the broad approach, courts protect communications when the communications help the lawyer provide legal advice. Courts have also taken a very broad view of the functional equivalence exception, deeming external consultants hired for a finite crisis (like the external PR consultant in the drug-recall scenario) functional equivalents of the client's employees and protecting communications with them when they facilitate the provision of legal advice.[8] Further confusing matters is the interchangeability of the standards. For example, a court majority might apply a narrow interpretation of the agency exception while the dissent applies the functional equivalents test.[9]

In addition to being unpredictable, the doctrine that provides exceptions for certain communications with third-party consultants is substantively off base. The narrow approach to the agency exception is at odds with the spirit of the doctrine and the reality of modern practice and, as a practical matter, unsustainable. The broad approach denies the public access to too much information and enables corporate misconduct. This is also often true of the functional equivalents test. Given the way corporations operate and courts apply the test, the functional equivalence exception collapses into the broad approach. Thus, courts protect communications that even those in favor of a robust corporate attorney–client privilege would not approve and deny protection in the very contexts for which the third-party doctrine was originally created.

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7. *See* Part III.D; *see also infra* note 291. There are many questions regarding whether the privilege applies to communications between lawyers and *internal* consultants that rise and fall on the law–business distinction. *See, e.g.*, Amway Corp. v. Procter & Gamble Co., No. 1:98CV726, 2001 U.S. Dist. LEXIS 4561, at *15-21 (W.D. Mich. Apr. 3, 2001) (denying privilege protection to communications between attorneys and *internal* PR consultants). Although controversial, these issues are outside the scope of this Article. Therefore, when this Article refers to third-party or external consultants, it means specialists that are not technically client employees. Also, when this Article refers to lawyers, it means inside and outside lawyers unless specifically identified. When it refers to general counsels, it means general counsels of corporations, not law firms.

8. For further explanation, see *infra* Part II.

9. *See infra* notes 264-69 and accompanying text.

Despite its practical importance, little has been written about when the attorney–client privilege protects, or should protect, third-party consultation in general. The scholarly literature that exists typically focuses on lawyers' communications with non-testifying experts in the context of litigation[10] and work–product protection, [11] or with a specific kind of expert such as accountants or PR consultants.[12] None of these camps grapple with the entire scope of the doctrine. As a result, the doctrine's complexity is often simplified.[13] The focus of this Article, however, is broader. It considers the issue as it relates to *all* third-party consultants, paying special attention to those situations where work–product protection might not apply.

When should communications between corporate lawyers and third-party consultants be protected? Given the corporative propensity to outsource and hire external consultants, should the attorney–client privilege follow suit? The answer to these questions must assuage the obvious tension between the need for effective legal service and the harm caused by misconduct that can occur within the zone of secrecy created by the privi-

10. *See, e.g.*, Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 AM. J. TRIAL ADVOC. 581 (1994) (analyzing when trial consultants are protected by attorney–client privilege and work–product doctrine); Steven B. Hantler et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 COMMLAW CONSPECTUS 7 (2004) (analyzing attorney–client privilege and work–product protection for litigation communication specialists hired for high profile corporate litigation); Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19 (1990) (analyzing attorney–client privilege and work product protection in the context of litigation and non-testifying experts).

11. Imwinkelried, *supra* note 10, at 48-49; *see also infra* notes 152-69 and accompanying text.

12. *See, e.g.*, Ann M. Murphy, *Spin Control and the High–Profile Client—Should The Attorney-Client Privilege Extend to Communications With Public Relations Consultants?*, 55 SYRACUSE L. REV. 545 (2005) (focusing on public relations consultants); Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 396-406 (2005) (focusing in part on auditors and PR specialists); Teena-Ann V. Sankoorikal et al., *Attorney-Client Privilege and Work Product Doctrine: Potential Pitfalls of Disclosure to Public Relations Firms*, 786 PLI/LIT 271 (2008) (focusing on PR relations firms but also providing a brief overview of the doctrine as it relates to third-party consultants generally); Deniza Gertsberg, Comment, *Should Public Relations Experts Ever Be Privileged Persons?*, 31 FORDHAM URB. L.J. 1443 (2004) (focusing on public–relations consultants in the criminal law context); Kim J. Gruetzmacher, Comment, *Privileged Communications with Accountants: The Demise of* United States v. Kovel, 86 MARQ. L. REV. 977 (2003) (focusing on accountants). Scholarship on how the doctrine applies to specific situations or consultants is valuable. Indeed, in a forthcoming article I focus on how lawyers manage public relations for corporate clients and work with PR consultants. *See* Beardslee, *Advocacy Part I*, *supra* note 6, at 22-34. Further, I utilize some of the findings from an empirical study related to this topic to explore issues in this article. *See infra* notes 25-26, 34 and accompanying text. My point, however, is that when making recommendations concerning the scope of the corporate attorney–client privilege with respect to specific kinds of external consultants, scholars often do not analyze the impact such recommendations will have on communications with other types of third-party consultants.

13. Jonathan M. Linas, *Make Me Well-Linked:* In re Grand Jury *and the Extension of the Attorney-Client Privilege to Public Relations Consultants in High Profile Criminal Cases*, 19 WASH. U. J.L. & POL'Y 397, 407 (2005).

lege.[14] When applied too broadly, the corporate attorney–client privilege enables corporations to run projects "through" lawyers to cover up damaging information that might otherwise be discoverable. In the recent tobacco litigation, courts discovered that attorneys purposefully oversaw studies conducted by external scientists on the addictiveness of tobacco to cloak the results with the attorney–client privilege.[15] This cloak allowed the companies to withhold information about the harms caused by smoking that otherwise would have informed public policy on tobacco marketing and sales. Thus, on the one hand, protecting the free flow of information between attorneys and external consultants can be at odds with our system's cooperative discovery rules.[16] This is precisely why the attorney–client privilege, perhaps the most robust of privileges, is gener-

14. *See, e.g.*, First Chi. Int'l v. United Exch. Co., 125 F.R.D. 55, 57 (S.D.N.Y. 1989) (explaining that a standard that "strike[s] a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery" will likely do more good than harm). The answers to these questions also, to a degree, require bracketing the dispute over whether the attorney–client privilege should be applied to corporations. The risks and benefits of applying the attorney–client privilege to corporations can be (and have been) debated. *See, e.g.*, Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 222-28 (1989) (outlining the debate); *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 206-34 (1988) (providing reasons why the privilege should not be applied to corporations); Sexton, *supra* note 2, at 464-68 (identifying risks and benefits of a corporate attorney–client privilege). However, this Article assumes that the attorney–client privilege should be applied to corporations as the Supreme Court has consistently held. Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981) (citing United States v. Louisville & Nashville R.R. Co. 236 U.S. 318 (1915)); *see also* Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 81 (2002) ("[T]he privilege—including the corporate privilege—is here to stay in one form or another. . . ."). This assumption, however, does not totally dispense with the dispute because the justifications for and against having a corporate attorney–client privilege are relevant to deciding how and when third-party communications should be covered. *See infra* notes 169-171 and accompanying text.

15. Ido Baum, *Corporate Attorney-Client Privilege: Who Represents the Corporation?*, 3 REV. L. & ECON., 62, 64 (2007) ("Tobacco corporations structured research activities through the external attorneys in order to secure the privilege, which applied also to communications between lawyers and third-party professionals."); Bruce A. Green, *Thoughts About Corporate Lawyers After Reading the Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DEPAUL L. REV. 407, 409 (2001) (same); Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931, 938 (2002) ("Allegations have been lodged, for instance, that tobacco lawyers arranged to have research on the health effects of smoking conducted under their aegis, in order to invoke the attorney-client privilege to prevent disclosure. . . ."); Gertsberg, *supra* note 12, at 1455 (explaining that the privilege was used to cover up damaging studies conducted by tobacco companies); Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1844 n.184 (1995) (same). *See, e.g.*, United States v. Phillip Morris USA, Inc., 449 F. Supp. 2d 1, 28 (D.D.C. 2006) (disparaging in-house and outside lawyers for "[taking] shelter behind baseless assertions of the attorney client privilege" as it relates to use of both inside and outside specialists); Burton v. R.J. Reynolds Tobacco Co., 200 F.R.D. 661, 678 (D. Kan. 2001) (denying protection to documents created by external tobacco committee); Liggett Group Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 209-11 (M.D.N.C. 1986) (denying protection to communications with external marketing consultant).

16. Then again, many rules are at odds with the traditional adversarial system, such as those dictating judicial management of cases, pretrial settlement conferences, or a limited number of preemptory challenges.

ally strictly construed.[17] On the other hand, when applied too narrowly, attorneys may not seek the help they need to provide competent legal advice and assist their clients in complying with the law.[18] As Model Rule of Professional Conduct 2.1 emphasizes, when determining the best legal course of action, attorneys may need to "refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[19] In the drug-recall scenario, for example, absent any possibility of privilege protection, the lawyer might not have sought advice from the external PR executive, and the company may have not recalled the drug as quickly or admitted knowledge of certain side effects. [20] The failure to take these actions could have negatively affected the legal strategies, judicial or juror opinions, or the corporation's bargaining power.

This Article contends, therefore, that exchanges between attorneys and third-party consultants should be protected under certain circumstances. It recommends revising the attorney–client privilege doctrine so that there is one standard based on the agency approach. Specifically, this Article argues that there should be a strong nexus between the consultant's service and the legal advice or services ultimately provided to the client. As a few federal courts have mandated, [21] the proponent must demonstrate not that the consultation simply helped the attorney but rather that it was *necessary* to the legal service actually provided. Some courts have attempted to apply a nexus test along these lines,[22] but they have not been very effective because this standard alone is too abstract to be predictable. To help determine whether the communication was for business as opposed to legal advice and whether the services provided by the attorney were essential and legal in nature (and not an attempt to shelter otherwise non-privileged information) courts should also consider four factors: (1) whether the lawyers were not skilled in the area in which they sought expert assistance; (2) the way the communication was conducted or distributed; (3) the existence of contemporaneous documentary or formal support for interpreting the facts surrounding the contested documents in the proponent's favor; and (4) the substance of the law involved.[23]

Although still subject to interpretation which might produce varying results, this standard will generate better reasoned decision-making be-

17. Fisher v. United States, 425 U.S. 391, 403 (1976).

18. *See infra* Part II.D. (explaining why the work–product doctrine does not necessarily provide protection to communications between attorneys and third-party consultants).

19. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002); *see also infra* notes 58-60 and accompanying text.

20. *See infra* note 188 and accompanying text.

21. *See infra* note 92.

22. *Id.*; *see also infra* note 298.

23. Obviously, the other parameters of the attorney–client privilege still apply. Namely, protection would only be afforded to those communications that are legal advice or based on or directly or indirectly reveal client confidences. *See infra* notes 68-69 and accompanying text.

cause it requires litigants and courts to spell out the connection between the consultation and the *legal* service with a rigor currently absent from the analysis. Moreover, as opposed to the current doctrine, it will protect lawyers' communications with third-party consultants when necessary, without creating an enormous asylum for malfeasant corporations. It also will enable informed decision-making and compliance. Further, elucidating one uniform test improves consistency and predictability to some extent. Finally, the analysis and the recommendations may also enhance the application of the attorney–client privilege in other contexts.[24]

Granted, some may disagree with the exact recommendations in this Article, and there may be alternate solutions to the problems it identifies. At a minimum, however, the Article highlights the importance of a discussion around the appropriate scope of the attorney–client privilege in the third-party consultant context. Moreover, this Article attempts to define a set of first principles that should be considered when developing any solution.

The analysis is informed, in part, by a recent study I conducted on the intersection of PR and corporate legal controversies [hereinafter PR Study]. The study consisted of: (1) fifty-seven interviews of general counsels of S&P 500 companies, outside lawyers, and PR executives; and, (2) a survey sent to all general counsels of the S&P 500 that elicited a twenty-eight percent response rate. [25] Findings from this study are relevant to a degree because the study explores attorneys' use of one type of third-party consultant, specifically external PR consultants.[26] Part I of this Article explains why third-party consultation is integral to the provision of legal advice in the corporate context. Then Part II provides an overview of the corporate attorney–client privilege and examines how courts apply it to communications between attorneys and third-party consultants. It

24. Although this Article focuses on federal case law, the analysis and recommendations are also applicable to states. *See infra* notes 289, 291. Further, this Article focuses on cases involving corporations, but occasionally non-corporate cases will be addressed. Lastly, the recommendations apply equally to individuals. Indeed, there have been cases addressing the attorney–client privilege and use of third-party consultants by attorneys representing individuals. *See, e.g.*, United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972) (holding that privilege extended to communications with accountant by attorney representing two individual clients); *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) (protecting communications with external PR consultant by attorney representing Martha Stewart).

25. For more information, see *infra* note 34.

26. That being said, the inferences that can be made from this study are limited because the study: (1) only concerns one type of third-party consultant; (2) was not, nor was it intended to be, random or statistically representative of all large, publicly-traded companies that have high demand for legal services; and (3) suffers from bias since most participants are members of the corporate bar or corporate executives with a vested interest in the privilege. Although more research should be done (especially with other non-lawyer corporate executives), the goal of the study was primarily to explore the perspectives of general counsels servicing large, publicly-traded corporations regarding the way the court of public opinion impacts corporate legal controversies and is managed today. Thus, I use preliminary results from this study minimally and only to enhance exploratory analysis and enrich the discussion.

also addresses the complexity involved in making the law–business distinction in this context and the role of the work–product doctrine. Part III delineates a set of criteria by which third-party attorney–client privilege doctrine should be judged. Based on these criteria, it concludes that the current application of the doctrine is too narrow, too broad, or not effective. Part IV proposes one possible solution.

I. THE IMPORTANCE OF THIRD-PARTY CONSULTATION TO THE PROVISION OF LEGAL ADVICE

Although it is relevant to individuals, the doctrine that applies protection to communications between lawyers and third-party consultants is especially salient for lawyers servicing large corporate clients who face a wide range of legal challenges across multiple jurisdictions.[27] Given today's highly regulated, litigious, publicized, and complex marketplace, corporations often rely on consultants from various disciplines to help make business and legal decisions.[28] According to Professor Robert Eli Rosen, "[t]his is the age of consultants."[29] As corporations have downsized and organized around self-managing project teams, they have hired external consultants to be part of those teams. [30] These teams (consisting

27. Sexton, *supra* note 2, at 464. Attorneys representing individuals, such as Roger Clemens, also sometimes need to consult with third-party professionals. *See infra* note 197; *see supra* note 24 (listing cases that address the use of third-party consultants by attorneys representing individuals). However, the issues addressed in this Article may arise more frequently for corporate clients. The landscape becomes even more complex for corporations operating in a global context given that in-house counsel communications are not privileged in some countries outside the United States. Nina Goswami, *Revealed: Akzo Nobel Threat to Global Firms*, LAWYER, Feb. 18. 2008, *available at* http://www.thelawyer.com/cgi-bin/item.cgi?id=131249&h=pnhpr&f=pnfpr.

28. Theodore Eisenberg, *Introduction* to RISK BEHAVIOR AND RISK MANAGEMENT IN BUSINESS LIFE 257 (Bo Green ed., 2000) (explaining there is a "need for a multidisciplinary approach to risk research in business life"); 1 EDNA SELAN EPSTEIN, THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 269 (5th ed. 2007) ("[C]orporations increasingly conduct their business not merely through regular employees but also through a variety of independent contractors retained for specific purposes."); Robert Eli Rosen, *"We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 659 (2002); BusinessTown.com, Hot Growth Areas for Consultants, http://www.businesstown.com/consulting/article3.asp (last visited Mar. 25, 2009) (projecting use of independent consultants is rising "to compensate for the knowledge gap" because large corporations are downsizing and reengineering). The movement in early 2000 to allow law firms to form multidisciplinary partnerships was based on corporate clients' need for a mix of independent consulting services. *See* RHONDA ABRAMS, THE SUCCESSFUL BUSINESS PLAN: SECRETS AND STRATEGIES 196 (4th ed. 2003) (recommending corporations hire independent management consultants, accountants, marketing consultants, and designers to help fill gaps).

29. Rosen, *supra* note 28, at 648 (analyzing organizational development in corporations and how law firms are reorganizing to serve company teams).

30. *Id.* at 642-648; *id.* at 647 ("[T]he organizational strategies of downsizing and outsourcing link corporate demand and the supply offered by consulting firms."); *id.* at 648 (explaining that outside consultants do not replace inside consultants but instead complement each other); *see also* Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced into the United States, What Could or Should Be the Role of General Counsel?*, 9 FORDHAM J. CORP. & FIN. L. 1, 36 (2003) ("When we have a particular matter we always form [a multidisciplinary partnership] team and work together to solve a problem.") (quoting a general counsel interviewee from a different study than the PR Study) [hereinafter

of internal employee professionals and external consultants) work collaboratively on projects.[31]

In turn, third-party consultants often have information essential to the attorney's provision of legal advice. [32] For example, given the impact the court of public opinion has on what charges are brought, whether a case will be filed or even goes to trial, the parties' negotiation power, and the legal strategies, corporate lawyers sometimes need help from external PR experts.[33] As part of the PR Study, I conducted fifty-seven qualitative interviews with general counsels of the S&P 500, law firm partners, and PR executives. I also sent a survey to all general counsels in the S&P 500. [34] Of the twenty-eight percent that responded to the survey, ninety-eight percent claimed they dealt with a high-profile legal issue one or more times in the past three years, and fifty-three percent hired an external PR

Beardslee, *Multidisciplinary Partnerships*]. *Cf.* Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. LEGAL EDUC. 521, 533 (2000) ("A common feature of in-house lawyering is "teaming": lawyers join with nonlawyer employees who have expertise in other disciplines to arrive at an integrated solution to a problem that has nonlegal as well as legal aspects to it. . . . Some business problems are simply too big and too complex to be solved by in-house teams of lawyer and nonlawyer employees. Outside advice is needed."); Robert Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations,* 34 LAW & SOC'Y REV. 457, 488 (2000) (explaining that "corporate management turned from relying on fixed institutional arrangements for conducting business to frequently reorganized, project based teams").

31. Rosen, *supra* note 28, at 647 (explaining that corporations have porous borders and that outsourcing includes not only hiring workers "on a contingent basis, with fewer benefits" but also hiring external specialists like engineers, accountants, and even outside counsel); Interview with General Counsel #31, at 16 (Sept 24, 2007) (on file with author) ("[Y]ou get together with your CEO, CFO, your general counsel, your outside counsel and your PR guy and you go through everything and get everyone's input on the documents and strategy and you get your outside PR firm too."). Research on collaboration and decisions by teams indicate that this approach is effective. *See, e.g.*, Alan S. Blinder & John Morgan, *Are Two Heads Better Than One?: An Experimental Analysis of Group vs. Individual Decisionmaking*, 47 (NBER Working Paper No. 7909, 2000), *available at* http://www.nber.org/papers/w7909.pdf (finding that group decisions are not slower and are superior to individual decisions).

32. *Cf. In re* Tri-State Outdoor Media Group, Inc., 283 B.R. 358, 362 (Bankr. M.D. Ga. 2002). Rosen, *supra* note 28, at 654 ("Legal work . . . requires obtaining 'input from the [whole] team.'" (quoting JOHN E. TRIANTIS, CREATING SUCCESSFUL ACQUISITION AND JOINT VENTURE PROJECTS: A PROCESS AND TEAM APPROACH 142 (1999))).

33. *See* Gertsberg, *supra* note 12, at 1462-65; *cf.* Hantler et al., *supra* note 10, at 8-10 (explaining that media affects settlement options, motions and juries; and "public relations can be a necessary element in litigating a case"); *but see* Linas, *supra* note 13, at 424 (arguing that media influence on prosecutorial discretion "is unsubstantiated, speculative, and hardly a valid reason to extend the privilege to public relations experts"). One interviewee explained that he may want to vet a letter written to the other side with a PR consultant before sending it to find out how the letter will be viewed by the public if the other side publishes it. Interview with Law Firm Partner #55, at 5 (Apr. 17, 2008) (on file with author).

34. This study was conducted as part of a larger research project funded by Harvard Law School's Program on the Legal Profession. I was the Associate Research Director of the Center and the lead researcher on the project. For a full description of the research agenda, methodology, and interview labeling system see Beardslee, *Advocacy Part I*, *supra* note 6, 58-74.

agency in the last three years to deal with a high-profile legal issue.[35] The preliminary findings from the interviews were consistent with the study. Moreover, they suggest that, as in the drug-recall scenario, in order to advise clients, general counsels meet with external PR consultants to discuss press releases, disclosure obligations, and the effect potential legal strategies might have in the media and on governmental agency regulators, stockholders, judges, potential juries, etc.[36] Many of the interviewees in the PR Study described the impact of PR on legal controversies as follows:

> [J]udges pay attention to the public relations effects of what they do . . . . I mean judges read newspapers, even the best judges aren't completely immune from the PR effects of the case. Certainly juries are not . . . even if they have been cautioned not to read the newspapers. So it's very important, and, take a proxy fight . . . how the shareholders perceive the combatants is the whole battle . . . [and if it is a] regulatory issue, . . . the SEC is now part of your audience.[37]

In order to provide a meaningful overview of the PR implications to the attorney (so the attorney can provide informed legal advice to the client), the PR consultants often have to know the confidential details surrounding the legal issues.[38] As one general counsel participant explained,

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35. Sixty percent of survey respondents reported dealing with a high profile legal matter many times in the past three years. Twenty-seven percent claimed a few times. Eleven percent said once or twice. Two percent said never. For more information on the use of PR consultants see generally Beardslee, *Advocacy Part I*, *supra* note 6.

36. Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (explaining that PR consultants need to understand legal strategies to provide PR advice and PR advice influences attorneys' strategic and tactical legal decisions). This is not to imply that lawyers build legal strategies around the media strategy, but simply that media impact is a consideration when providing legal advice. For example, a lawyer might want to meet with an external PR consultant if representing a private bank facing significant regulatory sanctions for money laundering. The company has to appear appropriately chastened before the regulators but also reassure the customers. A PR consultant can help the attorneys understand how certain statements might be construed and how to reach the right balance to prevent additional charges or cases against the company while still protecting defenses. *See, e.g.*, Interview with General Counsel #3, at 6 (Feb. 25, 2008) (on file with author). As one general counsel interviewee explained: A dialogue with the PR executive might lead to a lawyer recommending that "it's not worth it to confront a regulator publicly even when [he] think[s] [the regulator] is wrong" and he "was right on the narrow issue" because "it might be detrimental to [the] company's long-term dealings with them." Interview with General Counsel #22, at 5 (Feb. 11, 2008) (on file with author).

37. *Cf.* Interview with Law Firm Partner #55, *supra* note 33, at 14; *see also* Interview with Law Firm Partner #49, at 7-8 (Apr. 7, 2008) (on file with author) (explaining that juries are not as important as judges, shareholders, arbitragers, and market professionals because they often do not read the financial part of the paper).

38. Some scholars assert that "[a] client need not divulge incriminating information in order to receive effective media advice." Murphy, *supra* note 12, at 587. However, the qualitative interviews in the PR Study suggest the opposite. *See infra* note 194. Other scholars have made similar contentions. Gertsberg, *supra* note 12, at 1476 ("There is simply no practical way for meaningful discussions to occur if the lawyer is unable to inform the public relations expert of nonpublic facts, as well as the lawyer's defense strategies and tactics."); Hantler et al., *supra* note 10, at 23. That being said, many of the lawyer-interviewees are careful about sharing information that could destroy their case such as their opinion on the client's chance of winning. But when it comes to less major confidential information, many take their chances because they believe they have a good argument

"there nonetheless are situations where you, in order to be fair to [PR consultants] and for them to give you good advice about what they think the media's perspective on things might be, you are going to have to share some confidential information with them."[39] Moreover, the PR consultants need guidance from attorneys on how to position legal controversies and other types of disclosures to the public in a way that comports with the law, does not instigate potential lawsuits,[40] and is synergistic with the legal strategy. As one law firm partner interviewee commented, "more detailed briefing can help [the PR executives] understand the approach of the lawyer and the client so everyone is more likely to be on the same page." [41] To be sure, a message in the court of public opinion that is different than the message in the court of law can create inconsistencies that are fatal,[42] instill mistrust, or even anger the public at large.[43]

A need for expert consultation is not limited to the PR context.[44] Law-

against waiver. *See, e.g.*, Interview with Law Firm Partner #55, *supra* note 33, at 18; *see also supra* notes 280-282 and accompanying text.

39. Interview with General Counsel #11, at 6 (Mar. 26, 2008) (on file with author) (explaining that the amount of information that has to be shared with the communications people may be a bit limited because media stories do not get written at the level of intense detail).

40. Peter J. Gardner, *Media at the Gates: Panic! Stress! Ethics?*, VT. B.J., Sept. 27, 2001, at 39; Hantler et al., *supra* note 10, at 22-23; Beth A. Wilkinson & Steven H. Schulman, *When Talk Is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 204 (2002).

41. Interview with Law Firm Partner #53, at 2 (Apr. 10, 2008) (on file with author).

42. For example, if a client is being sued for violation of antitrust laws, the lawyer will likely try to demonstrate that the client is not a monopolist. The PR strategy for the corporation, however, might be to emphasize that the client is the dominant market participant. Christopher P. Bogart & Robert D. Joffe, *High-Profile Litigation, Objectives Concerns and Preliminary Considerations*, *in* 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 67:2 (Robert L. Haid ed., 2009) (discussing the "strong need to coordinate the client's litigation strategy and the client's on-going business strategies, shareholder/investor relations, and public relations").

43. Michael Dore & Rosemary Ramsay, *Dealing with Public Relations Concerns in Products Liability and Toxic Tort Litigation*, N.J. LAW., Feb. 2002, at 56 ("Finally, all public disclosures must be coordinated. When clients, counsel, experts, and other persons in the disclosure process convey different information (or even the same information at very different times) media mistrust and public uncertainty and/or anger inevitably increases."); Interview with Law Firm Partner #59, at 5 (Apr. 29, 2008) (on file with author) ("If a reporter decides that they do not believe your defense or that you are not being candid . . . you are hiding something . . . it creates even more of a story in and of itself. So you've got to be especially careful of this.").

44. For example, many scholars contend that attorneys need to consult with accountants to provide competent legal advice about complex financial transactions. *See, e.g.*, Gruetzmacher, *supra* note 12, at 977; Carl Pacini, Pamella Seay & Raymond Placid, *Accountants, Attorney-Client Privilege, and the* Kovel *Rule: Waiver Through Inadvertent Disclosure Via Electronic Communication*, 28 DEL. J. CORP. L., 893, 893 (2003). Although twenty-five state courts recognize an accountant-client privilege, federal courts do not. *Id.* at 894 n.3. That said, the Internal Revenue Service Restructuring and Reform Act of 1998, enacted in 2000, grants tax payers (in federal forums) something similar to the common law attorney–client privilege. *See generally* Alicia K. Corcoran, Note, *The Accountant-Client Privilege: A Prescription for Confidentiality or Just a Placebo?*, 34 NEW ENG. L. REV. 697, 698 (2000). However, because it has severe limitations and its scope is very uncertain, the accountant-client privilege cannot be relied on to protect communications. *Id.* at 698-99.

yers may need advice from various external consultants in many different types of situations to provide complete legal advice.[45] For example, when an investment banking company approaches a large corporation about an investment to produce capital losses to offset gains from a recent transaction, the corporation's general counsel may need to talk with the investment banking consultant about the proposal and its potential tax consequences based on the corporation's goals, history, and confidential financial situation.[46] In addition, presuming the general counsel is not a tax expert, he or she may need to discuss the structure and purpose of the transaction and the potential tax consequences with a tax consultant. It is not until after these conversations take place that the general counsel can provide a recommendation on the risks and legality of the investment proposal. A similar need to resort to third-party consultation exists when a corporation considers a restructuring that may lead to a significant tax refund. [47]

As Professor Rosen points out, "[l]egal risks not only must be assessed, but also processed because legal risks often are not detached risks."[48] For example, attorneys need to understand the business risks in order to understand a company's insolvency risks and, therefore, must work with accounting and finance experts. [49] As a general counsel interviewee of a large pharmaceutical company explained:

> [I]n the world there is now a convergence of discipline, not just legal and public affairs. People who are actually able to manage complicated situations have to be able to look at it from multiple perspectives. There are no more pure finance questions. There are no more pure marketing questions. There are no more pure policy questions or legal questions or HR questions. They are all multidisciplinary.[50]

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45. Gregory Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS (forthcoming 2010) (manuscript at 7, on file with author) (explaining that a real estate transaction may involve questions related to engineering, environmental science, tax, zoning, finance, insurance, and liability), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1261015.

46. *See, e.g.*, United States v. Ackert, 169 F.3d 136, 138 (2d Cir. 1999). Or a lawyer might hire an environmental consultant to help with an environmental audit and assess whether the corporation has complied with environmental laws. Sisk & Abbate, *supra* note 45, at 13-14 (describing this example).

47. *See, e.g.*, United States v. Adlman (*Aldman I*), 68 F.3d 1495, 1497 (2d Cir. 1995).

48. Daly, *supra* note 30, at 521-522 ("'[L]egal' advice is rarely just that. The complexity of modern society increasingly creates a superabundance of problems in which it is virtually impossible to separate the legal component from components more traditionally associated with other disciplines . . . ."); Rosen, *supra* note 28, at 659; Sisk & Abbate, *supra* note 45, at 11 ("[T]he lawyer must . . . know the client's business and offer business-relevant advice if legal counsel is to have any practical value.").

49. Rosen, *supra* note 28, at 659; *cf. id.* at 670 ("Teams are multidisciplinary, so the lawyers meet as equals with, for example, engineers and accountants."); Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 281 (2000) ("The needs of clients are increasingly difficult to pigeonhole as 'legal,' 'accounting,' 'financial planning,' 'environmental planning,' etc. And the boundaries between the law and other disciplines are blurring."); *see also infra* notes 127-128 and accompanying text.

50. Interview with General Counsel #42, at 23 (Oct. 1, 2007) (on file with author).

Accordingly, consultation with various third-party specialists is sometimes essential to the provision of legal advice.

In *U.S. v. Kovel*, the attorney–client privilege was extended to communications with a third-party consultant for just this reason[51]—because "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others."[52] Since this case was decided in 1961, there has been dramatic growth in the number of cases filed each year, dollars spent on litigation,[53] amount of regulation,[54] number of government agencies,[55] complexity of corporate laws,[56] and number of media outlets.[57]

As far back as 1950, courts believed it was the lawyer's "duty" to consider "relevant social, economic, political and philosophical considerations" when providing legal advice.[58] Consistent with that, today's Model Rules of Professional Conduct urge lawyers to consider non-legal factors, consult with non-legal professionals, and guide the client when outside experts' recommendations conflict. [59] Attorneys are, therefore, in an

51. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961); *see supra* notes 74-76 and accompanying text; Emily Jones, Note and Comment, *Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of* United States v. Adlman, 18 PACE L. REV. 419, 423 (1998).

52. *Kovel*, 296 F.2d at 921 (internal citations and quotations omitted); *see also*, Jones, *supra* note 51, at 423.

53. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (2005); Neal Ellis, *Saving the Jury Trial*, BRIEF, Summer 2005, at 15. *But see* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 994-95 (2003) (arguing that there has not been a litigation explosion).

54. For example, in 2001, the Securities and Exchange Commission introduced the Fair Disclosure Regulation of 2001 (Regulation FD) that "prohibits executives from feeding market-moving information to select individuals." Stephen Barr, *The FD Effect—Fair Disclosure Regulation on Corporations*, CFO, April 1, 2001, *available at* http://www.cfo.com/article.cfm/299289?f=search. *See infra* notes 203-207 and accompanying text. Also, the Sarbanes Oxley Act was enacted in 2002. The Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, 116 Stat. 745); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1756 (2004) ("[T]he pace of regulatory development is increasing.").

55. Even non-government organizations like Public Citizen focus attention on corporations and consumer protection.

56. Dennis R. Lassila & L. Murphy Smith, *Tax Complexity and Compliance Costs of U.S. Multinational Corporations*, *in* 10 ADVANCES IN INTERNATIONAL ACCOUNTING 207, 207 (T.S. Doupnik ed., 1997), *available at* http://ssrn.com/abstract=247726 (explaining that U.S. tax laws have become increasingly complex).

57. Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 636 (2008) (describing media outlets that are "instrumental in orchestrating the public relations wars"); *cf.* Robert Schmuhl, *Government Accountability and External Watchdogs*, ISSUES OF DEMOCRACY, Aug. 2000, at 21, 24 http://italy.usembassy.gov/pdf/(e)/ijde0800.pdf (last visited on Feb. 13, 2008) (describing "the new information environment" as it relates to the government and press).

58. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950); *cf.* Murphy, *supra* note 12, at 589 ("One could even argue that it is an attorney's ethical obligation to attempt to influence public opinion.").

59. Rule 2.1 states that attorneys "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002). However, the com-

awkward position. On the one hand, adequate legal representation cannot be provided without sometimes candidly consulting with third-party consultants, but on the other, this divulgence may not be protected. One interviewee aptly summed up the conflict with respect to PR consultants: "In hindsight, maybe the PR people should have been more in the loop, but then you have privilege issues right? And, so it's you are damned if you do it and damned if you don't."[60]

II. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE AND THIRD-PARTY CONSULTANTS

A. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

In *Upjohn Co. v. United States*, [61] the Supreme Court resolved the conflict among federal circuits about which employees personify the corporate entity so that their communications with corporate counsel can be considered attorney-*client* communications.[62] The Court adopted a case-by-case approach that in practice has resulted in an expansive rule emphasizing the importance of the flow of information between corporate employees and attorneys for sound legal advice.[63] It justified broad pro-

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ments explain that "[p]urely technical advice . . . can sometimes be inadequate. . . . Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts." *Id.* at R. 2.1 cmts. (2), (4). Further, some legal scholars have argued that Model Rule 2.1 obligates attorneys to advise clients on non-legal, related issues. *See, e.g.*, Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 366-67 (2005).

60. Interview with Law Firm Partner #40, at 8 (Aug. 22, 2007) (on file with author) (referring to consultation with third-party PR expert).

61. 449 U.S. 383 (1981).

62. *Id.* at 386. Before this landmark decision, courts applied one of two standards to corporations. The narrow "control group" test (applied by a majority of federal courts) limited attorney–client privilege to communications with employees that could control corporate decisions based on the attorney's advice. Sexton, *supra* note 2, at 451. *See also* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485-86 (E.D. Pa. 1962) (describing control test). The broader "subject matter" test (applied by a minority of federal courts) protected communications by employees when the subject matter concerned the employees' employment duties. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (rejecting the control group test); Sexton, *supra* note 2, at 453. For a clear history of these tests, see Sexton, *supra* note 2, at 449-56.

63. *Upjohn*, 449 U.S. at 392-93; *cf.* Sexton, *supra* note 2, at 502. *Upjohn* rejected the control group test and neither accepted nor rejected the subject matter test. *Upjohn*, 449 U.S. at 392-93. Some claim the Court, in rejecting the control group test, embraced the subject matter test. *See, e.g.*, Baum, *supra* note 15, at 62, 64; Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 932 (2006) ("Although the Court declined to set forth a bright-line test, its recognition of the privilege here suggests receptivity to the [subject matter] approach."). However, the subject matter test was never addressed and the Court expressly refused to adopt any specific test. *Upjohn*, 449 U.S. at 386; *id.* at 402 (Burger, J., concurring) (asserting that the Court should articulate a standard); *see also*, Sexton, *supra* note 2, at 458-59, 462; Bufkin Alyse King, Commentary, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 631 (2002) ("[*Upjohn*] did not adopt the subject matter test."). State courts still apply both the subject

tection on the grounds that lawyers need to be able to communicate freely with corporate employees in order to carry out their professional obligations and guide corporate clients to legal compliance. [64] Thus, the Court considered only whether: (1) the information helped the attorney provide legal advice; (2) the communications related to the employees' corporate duties; (3) the "employees were sufficiently aware that they were being questioned;"[65] and, (4) the communications were considered and kept "highly confidential." [66] Therefore, *Upjohn* provides protection to a very broad group of corporate employees.[67] If the company is conducting an internal investigation, all the communications with the employees will be covered if the lawyer eventually provides legal advice to the client because these communications, arguably, helped the attorney do so. Although this rule is broad, other limits on the attorney–client privilege still apply. Communications from attorney to client are only covered when they constitute legal advice or are based on or might disclose confidential client information.[68] Further, while neither client nor attorney can be compelled to disclose communications, the client may be

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matter and control test and "everything in between." Brown, *supra* at 934 (commenting on the problems this lack of uniformity poses for national corporations).

64. *Upjohn*, 449 U.S. at 390-92. Many agree that *Upjohn* provides very broad protection. *See e.g.*, Chambliss, *supra* note 54, at 1726 ("[T]he Supreme Court [in *Upjohn*] has endorsed broad protection of the corporate privilege. . . ."); King, *supra* note 63, at 632; Brian E. Hamilton, Note, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney–Client Privilege*, 1997 ANN. SURV. AM. L. 629, 632-33 (1997).

65. *Upjohn*, 449 U.S. at 394-95 (emphasizing that the conversations with the employees helped the lawyers "to be in a position to give legal advice to the company with respect to the payments") (internal quotations omitted).

66. *Upjohn*, 449 U.S. at 395. Some courts interpret this to be a "need to know" standard. *See, e.g.*, FTC v. GlaxoSmithKline, 294 F.3d 141, 147-48 (D.C. Cir. 2002); Wrench LLC v. Taco Bell Corp., 212 F.R.D. 514, 517-18 (W.D. Mich. 2002); Sexton, *supra* note 2, at 503.

67. Hamilton, *supra* note 64, at 629-30 (characterizing the *Upjohn* decision as providing protection to "a much wider range of employees than would have been protected under the alternative 'control group' standard"); *see also supra* note 64.

68. The attorney–client privilege "shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney." United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994); United States v. Defazio, 899 F.2d 626, 635 (7th Cir. 1990) (privileging communication from attorney to client as long as it is legal advice or indirectly or directly reveals confidential information); *In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) ("[A]dvice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters . . . . [T]he privilege cloaks a communication from attorney to client based, *in part at least*, upon a confidential communication to the lawyer from the client." (internal annotations omitted)); United States v. Ramirez, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002) ("[I]t is widely accepted that the privilege encompasses not only (qualifying) communications *from* the *client* to her attorney but also communications *from* the *attorney* to her client in the course of providing legal advice."); Rattner v. Netburn, No. 88-Civ-2080, 1989 U.S. Dist. LEXIS 6876, at *9-10 (S.D.N.Y. June 20, 1989) (noting that courts generally concur that protection extends to legal advice from attorney if it might reveal confidential client communication). Some courts have a narrower view and only apply protection if confidential information is actually disclosed. United States v. Silverman, 430 F.2d 106, 122 (2d Cir. 1970) ("A communication from an attorney is . . . privileged . . . if it has the effect of revealing a confidential communication from the client to the attorney."). For an overview of federal cases apply-

obligated to reveal underlying facts.[69]

B. Third-Party Attorney–Client Privilege Doctrine

Generally, the privilege does not apply or is considered waived when the client voluntarily discloses an otherwise confidential, privileged communication to a third party.[70] The rationale is that if clients are willing to divulge information to third parties, they would likely divulge it to their attorneys, even if no privilege applies.[71] Thus, a primary justification for the privilege—to promote the free flow of information between client and attorney—disappears.[72]

There are, however, two general exceptions. [73] Communications between attorneys, clients, and third parties can be protected when: (1) the third party is the agent of the attorney *or* client (agency theory); or (2) the third party is the functional equivalent of the client's employees (the functional equivalents test).

1. Third Party as Agent

The agency theory stems from *United States v. Kovel,* decided in 1961.[74] There, the Second Circuit applied the attorney–client privilege to communications between the lawyer, client, and an accountant employed by a law firm.[75] It analogized the accountant to an interpreter translating a foreign language. It reasoned that attorneys sometimes have to seek help from others given modern complexities and concluded that communications with third-party agents should be protected when they are needed

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ing the privilege to communications from lawyer to client, see *Thurmond v. Compaq Computer Corp*, 198 F.R.D. 475, 480-82 (E.D. Tex. 2000).

69. H.W. Carter & Sons v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *3 (S.D.N.Y. May 16, 1995); Davis & Beisecker, *supra* note 10, at 592.

70. Hickman v. Taylor, 329 U.S. 495, 508 (1947) (explaining that there is no expectation of confidentiality); Cavallaro v. United States, 284 F.3d 236, 246 (1st Cir. 2002); 8 John Henry Wigmore A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2317 (McNaughton rev. 1961).

71. *See* Westinghouse Elec. Corp. v. Republic of the Philippines (*Westinghouse II*), 951 F.2d 1414, 1424 (3d Cir. 1991).

72. Republic of the Philippines v. Westinghouse Elec. Corp. (*Westinghouse I*), 132 F.R.D. 384, 388 (D.N.J. 1990).

73. The exceptions apply to situations in which (a) the lawyer, client, and third-party consultant meet at the same time; and (b) after formation of the privilege, the client or lawyer later disclose privileged communications to the third-party consultant. In the former, one might argue that the attorney–client privilege never formed and in the latter that the attorney–client privilege was waived. This Article will refer to both exceptions as the "third-party attorney–client privilege doctrine" or the "third–party doctrine."

74. 296 F.2d 918, 922 (2d Cir. 1961) (holding that the attorney–client privilege may apply to employee/agent of lawyer under some circumstances). This exception is sometimes referred to as the *Kovel* doctrine or the derivative attorney–client privilege. *See* Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1196-97 (Mass. 2009); Epstein, *supra* note 28 at 217. This Article will refer to it as the *Kovel* or agency theory or exception.

75. *Id.* at 920. The accountant had been employed by the law firm for over fifteen years and was formerly an Internal Revenue agent. *Id.* at 919.

to accomplish the attorney's work.[76]

Since *Kovel*, many federal courts, including the Second Circuit, have applied the privilege to various types of third parties.[77] It is generally safe to assume that the presence of non-professional agents, "immediate subordinates,"[78] or "ministerial agents"[79] under the supervision of the attorney and necessary for an attorney to conduct business such as law clerks, paralegals, and secretaries,[80] will not abrogate the privilege.[81] However, as will be discussed below, no assumptions are safe when the third party is a professional consultant.

Generally, a narrow and a broad view have emerged with respect to *Kovel's* agency theory.[82]

a. The Narrow Approach

Courts that view *Kovel* narrowly generally follow the Second Circuit's interpretation in *United States v. Ackert*,[83] decided thirty-eight years after

76. *Id.* at 922 ("[T]he presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege . . . ."); *id.* at 923 ("What is vital . . . is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.").

77. United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) (accountants); *In re* Grand Jury Proceedings, 786 F.2d 3, 6 n.4 (1st Cir. 1986) (paralegals); United States v. Alvarez, 519 F.2d 1036, 1045-46 (3d Cir. 1975) (psychiatrists); Young v. Taylor, 466 F.2d 1329, 1332 (10th Cir. 1972) (secretaries and law clerks); United States v. Cote, 456 F.2d 142, 144-45 (8th Cir. 1972) (accountants); NLRB v. Harvey, 349 F.2d 900, 906-07 (4th Cir. 1965) (private investigators); U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (non-testifying experts and patent agents); Golden Trade v. Lee Apparel Co., 143 F.R.D. 514, 518 (S.D.N.Y. 1992) (patent agents).

78. Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 40 (D. Md. 1974); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 794 (D. Del. 1954).

79. FTC v. TRW, Inc., 628 F.2d 207, 212 (D.C. Cir. 1980).

80. *Young*, 466 F.2d at 1332; Imwinkelried, *supra* note 10, at 26.

81. United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) ("[T]he privilege covers communications to non-lawyer employees with a menial or ministerial responsibility that involves relating communications to an attorney." (internal quotations omitted)); Dabney v. Inv. Corp. of Am., 82 F.R.D. 464, 465-66 (E.D. Pa. 1979) ("[P]rotected subordinates would include any law student, paralegal, [or] investigator."); Imwinkelried, *supra* note 10, at 25 ("All courts and commentators agree that clerks and secretaries fall within the definition [of attorney's agent].").

82. Deniza Gertsberg peripherally describes *Kovel* as providing protection for two categories of third parties: (1) those that fit what this Article calls the narrow theory; and (2) those "whose work is sufficiently important that it deserves protection, such as law clerks, assistants, and 'aides of other sorts.'" Gertsberg, *supra* note 12, at 1457. According to Gertsberg, the second category exists because of the "complexities of modern existence." *Id.* at 1457-58. This Article contends, however, that courts have interpreted *Kovel* even more broadly to cover communications with third-party consultants when such communications facilitate the provision of legal advice.

83. 169 F.3d 136, 139-40 (2d Cir. 1999); *see also* Murphy, *supra* note 12, at 564-66 (explaining that *Ackert* greatly limits *Kovel*). According to some sources, this narrow approach is taken by a majority of courts. *See, e.g.*, Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1198 & n.20 (Mass. 2009) (explaining it "agree[d] with the majority of courts" that the *Kovel* doctrine only applies when the consultant acts as a translator but that "[a] few courts have applied the *Kovel* doctrine with less rigidity"); Black & Decker Corp. v. United States, 219 F.R.D. 87, 90 (D. Md. 2003) ("Cases decided after *Kovel* have narrowly interpreted this concept of derivative privilege."); Gruetzmacher, *supra* note 12, at 978 ("Over the past four decades, courts have repeatedly narrowed the holding in *Kovel.*

Kovel. There, the Second Circuit interpreted *Kovel*'s exception only to apply to third parties who interpret information the client already has to improve comprehension between attorney and client.[84] In *Ackert*, an investment banker pitched a proposal to the corporate client to reduce tax liability from a recent sale of the client's subsidiary. [85] The client's internal tax counsel researched the proposal and met with the investment banker on several occasions to gauge the tax implications and better advise his client about the legal and financial ramifications of the proposal.[86] The court found that the consultation was important to the attorney's ability to give effective legal advice.[87] But it did not apply the privilege[88] because the investment banker did not translate client communications[89] nor enable counsel to understand aspects of the client's *own* communications that could not otherwise be appreciated in the rendering of legal advice. [90] Accordingly, the common thread for applying a narrow interpretation of *Kovel* is the ability to analogize the third-party consultant's role to that of a translator—solely interpreting the confidential client information without adding new information.[91] It is only when the third party's services are necessary for the client and attorney to effectively communicate that the privilege attaches under the narrow agency approach. Consequently, courts adopting the narrow approach would not protect any of the communications in the drug-recall scenario.

As a result, there is very little protection left for communications with accountants, and the little protection remaining is often confusing and unpredictable.").

84. *Ackert*, 169 F.3d at 139. This case involved an IRS tax summons enforcement proceeding. *Id.* at 138. During an audit, the IRS wanted to question Ackert about conversations with counsel. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 139.

88. *Id.* ("[T]he privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client.").

89. *Id.* at 140.

90. *Id.* at 139.

91. *See, e.g.*, FTC v. TRW, Inc. 628 F.2d 207, 209-12 (D.C. Cir. 1980) (explaining it would have extended *Kovel* to a research institute consultant hired to study "[a] company's complex computerized credit reporting system" had the party shown the institute was hired to put company's computerized credit reporting system into a more understandable form for lawyers); In re G-I Holdings Inc., 218 F.R.D. 428, 434 (D.N.J. 2003) ("The *Kovel* court thus carefully limited the attorney-client privilege between an accountant and a client to when the accountant functions as a 'translator' between the client and the attorney); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) ("*Kovel* 'did not intend to extend the privilege beyond the situation in which [a professional] was interpreting the client's otherwise privileged communications or data to enable the attorney to understand those communications or that client data."); Sankoorikal et al., *supra* note 12, at 281-82 (explaining both the functional equivalents and agency exceptions but claiming that the *Kovel* exception "has been viewed as a narrow 'translator' or 'interpreter' exception"); *see also infra* note 173. Some courts claim to apply the translator approach, yet instead apply broader protection. *See, e.g.*, Calvin Klein Trademark Trust v. Wachner, 124 F. Supp. 2d. 207, 209 (S.D.N.Y. 2000) (protecting documents shared with an external investment banker to help the attorney draft disclosure documents because the investment banker interpreted for the client and the law firm what a reasonable business person would consider "material" for disclosure purposes).

b. The Broad Approach

Perhaps because this standard is so limiting, courts, even after *Ackert*, have applied broader interpretations of *Kovel*. Often, courts adopting a generous view of *Kovel* claim the privilege applies to third parties who provide services that merely *facilitate* the attorney's ability to render legal advice.[92] These courts privilege lawyers' consultations with many external professional consultants. For example, one court privileged communications between an outside PR consultant, the client, and lawyers because the PR specialist "participated to assist the lawyers in rendering legal advice, which included how defendant should respond to plaintiff's lawsuit."[93] Courts subscribing to a very broad view of *Kovel* would likely protect all communications in the hypothetical at the beginning of this Article.

92. *See, e.g.*, United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975); U.S. Postal Serv., v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 161 (E.D.N.Y. 1994); Golden Trade v. Lee Apparel Co., 143 F.R.D. 514, 518-19 (S.D.N.Y. 1992); Willemijn v. Apollo Computer, Inc., 707 F. Supp 1429, 1446 (D. Del. 1989); Cuno Inc. v. Pall Corp., 121 F.R.D 198, 202 (E.D.N.Y. 1988); Byrnes v. Empire Blue Cross Blue Shield, No. 98-Civ-8520, 1999 WL 1006312, at *1 (S.D.N.Y. Nov. 4, 1999); *In re Tri-State Outdoor Media Group, Inc.*, 283 B.R. 358, 362-63 (Bankr. M.D. Ga. 2002) (applying a broad interpretation of *Kovel* to protect communications with financial bankruptcy advisor but ultimately determining that the attorney–client privilege was waived in part by offering a third party as a testifying expert witness); Eglin Fed. Credit Union v. Cantor, Fitzgerald Sec. Corp., 91 F.R.D. 414, 418 (D.C. Ga. 1981) ("If the accountant is consulted in connection with the client's obtaining legal advice, the privilege extends to cover confidential documents in the accountant's possession. If the documents were turned over to the accountant for reasons totally unrelated to seeking legal advice, the accountant is viewed as an unrelated third party and the attorney-client privilege as to these formerly confidential documents is waived." (internal citation omitted) (citing In re Horowitz, 482 F.2d 72, 81 (2nd Cir. 1973); United States v. Kovel, 296 F.2d 918, 922 (2nd Cir. 1961))); *see also supra* note 236. As will be discussed *infra*, some courts take a less extreme approach like that recommended in this Article. *See, e.g.*, *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (requiring that consultants "have a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body" and protecting communication with external PR consultants because attorneys "were not skilled at public relations" and "needed outside help" to provide legal advice); *see also* United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972) (privileging audit papers created by an accountant at the attorney's request because the accountant was "a necessary aid to the rendering of effective legal services to the [non-corporate] client"). *See also* Haugh v. Schroder Inv. Mgmt, No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *9-10 (S.D.N.Y. Apr. 25, 2003).

93. H.W. Carter & Sons v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995). Courts have applied a broad interpretation of *Kovel* to protect communications with patent agents. *See, e.g.*, *Golden Trade*, 143 F.R.D. at 518, 519 n.3. A broad approach has also been applied to protect communications with jury consultants. *See In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 326 (explaining that jury and personal communication consultants come within attorney–client privilege as they have a close nexus to attorney's role in advocating the client's cause before a decision-making body); *In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 668 (3d Cir. 2003) (Garth, J., concurring); Smithkline Beecham Corp. v. Apotext Corp., 232 F.R.D. 467, 476-77 (E.D. Pa. 2005) (applying protection to jury consultant expert). Of course, communications with jury consultants are often protected by the work–product doctrine.

2. *Third Party as Functional Equivalent*

Although *Upjohn*[94] dealt with employees of a corporation, its reasoning has been applied by federal courts to third-party consultants who are the "functional equivalents" of the corporate client's employees. [95] The rationale is that "[t]here is no reason to differentiate between[, for example,] an accountant-employee and a regularly retained outside accountant when both occupy the same extremely sensitive and continuing position as financial adviser, reviewer, and agent: both possess information of equal importance to the lawyer." [96] For example, in *In re Bieter*, [97] the Eighth Circuit, relying on *Upjohn*, found that the commercial and retail development consultant hired by the company was "in all relevant respects the functional equivalent of an employee" for the purposes of applying the privilege.[98] The consultant was regularly retained, often the sole company representative at meetings, and possibly the only person to possess information regarding the transaction at issue in the litigation.[99]

The role the quasi-employee plays within the company and how he or she is treated is more important than the length or regularity of service, formal titles, or contracts between the parties. For example, in *NXIVM Corp. v. O'Hara*, the court found that a non-paid volunteer was a functional equivalent of the client's employees because this individual was "not some mere or informal advisor," but a "quintessential insider of [the] business on every aspect confronting it."[100] As the Third Circuit explained, the functional equivalents test protects communications to third-party consultants who "possess[ ] a commonality of interest with the client."[101]

3. *Functional Equivalent Versus Agent*

At first blush, the functional equivalents test seems practically and theoretically distinct from the agency theory. It concerns third parties who,

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94. Upjohn Co. v. United States, 449 U.S. 383, 383 (1981).

95. *In re* Currency Conversion Fee Antitrust Litig., MDL No. 1409-M-21-95, 2003 U.S. Dist. LEXIS 18636, at *3-4 (S.D.N.Y. Oct. 21, 2003) (noting that a "limited number of cases" support this interpretation). Because this exception is distinct in theory, courts do not generally reconcile holdings with *Kovel*. That being said, as will be discussed, sometimes courts consider both exceptions in one opinion. Moreover, in practice, when the functional equivalents exception is applied broadly, the functional equivalency test collapses into the broad approach to *Kovel*.

96. Sexton, *supra* note 2, at 498; *see also In re* Bieter Co., 16 F.3d 929, 937 (8th Cir. 1994).

97. 16 F.3d at 929.

98. *Id.* at 938-39. The court also relied on the reasoning in *McCaugherty v. Siffermann*, 132 F.R.D. 234, 239-40 (N.D. Cal. 1990), and Sexton, *supra* note 2, at 498.

99. *In re Bieter*, 16 F. 3d at 938.

100. 241 F.R.D. 109, 139 (N.D.N.Y. 2007).

101. *In re* Grand Jury Investigation, 918 F.2d 374, 386 n.20 (3d Cir. 1990); Smithkline Beecham Corp. v. Apotext Corp., 232 F.R.D. 467, 476-77 (E.D. Pa. 2005) (same); Sexton, *supra* note 2, at 487, 498 (explaining that functional equivalents should have "a significant relationship to the corporation" and attempting to define a rule to determine when attorney–client privilege extends to employees and/or functional equivalents); *see also In re Bieter*, 16 F. 3d at 937.

because of their "continuing positions" and the way that they are treated by employers, are deemed synonymous with client employees. The agency theory, on the other hand, concerns outsiders usually (but not always) hired by the attorney for a specific matter to facilitate the provision of legal advice. However, when the functional equivalents test is considered in the context of third-party *professional* consultants (the subject of this Article), this difference begins to disappear for a few reasons.

a. Commonality of Interest

For some courts applying the functional equivalents test, a "commonality of interest" means simply that the third party had information or advice important to the lawyer's provision of legal advice or services.[102] Thus, the main inquiry mimics that found in the broad agency approach of *Kovel*. [103] For example, in *Baxter Travenol Laboratories v. Lemay*,[104] the client hired a former employee of the opposing party as a "litigation consultant" to provide information based on his former employment with the opposing party; in essence the client hired a witness. [105] The court reasoned that neither the status of the communicator nor the content of the communication should dictate application of the privilege.[106] As long as the communication is made by the functional equivalent "at the client's behest, in order to secure legal advice, and such communication is intended by the client and participants to be confidential," the communication should be protected.[107] Although this case is an extreme one,[108] it epitomizes the importance some courts place on the flow of information between attorney and "client" so the attorney can render better legal advice. Moreover, it demonstrates the potential breadth of the functional equivalents test.

A more tempered example is *McCaugherty v. Siffermann*.[109] There, the court found that consultants hired by a company to assist it in arranging the sale of another company should be treated as functional equivalents of the hiring company.[110] In making this determination, the court found important that: (a) the consultants were hired to advance the

102. *In re Bieter*, 16 F.3d at 938-39; Twentieth Century Fox Film Corp. v. Marvel Enter., No. 01-Civ-3016, 2002 WL 31556383, at *2 (S.D.N.Y. Nov. 15, 2002).

103. *But see* Sankoorikal et al., *supra* note 12, at 281 (claiming that "courts have applied the [functional equivalents] exception carefully, often ruling that the facts do not support a finding that the third party operated as a 'functional [equivalent]' . . . because [this exception can] encompass many communications with third-party contractors").

104. 89 F.R.D. 410 (S.D. Ohio 1981).

105. *Id.* at 412-13.

106. *Id.* at 414.

107. *Id.*

108. Alexander, *supra* note 14, at 320 n.433 (critiquing the *Baxter* court's "bootstrap approach").

109. 132 F.R.D. 234 (N.D. Cal. 1990).

110. *Id.* at 238-39. This case involved a complicated fact pattern. In its simplest form, one company (FSB) hired another company (FADA) for management services and assistance in the sale of FSB. FADA hired two consultants to help with the sale of FSB. *Id.* at 235-36.

interests of the hiring company in an "environment dense in regulations"; (b) there were legal implications concerning the sale;[111] and, (c) the consultants and lawyers needed to share information so that the lawyers could provide fully informed legal advice to the consultants and the company.[112]

b. The Context

Second, although providing regular, ongoing services is indicative of functional equivalency, courts consider the context in which the third party was hired and do not always require a certain length of service.[113] Consequently, a third-party professional consultant can be hired for a discrete project, like the external PR consultant in the drug-recall scenario, and be deemed a functional equivalent. For example, in *Federal Trade Commission v. GlaxoSmithKline*, the FTC claimed that GlaxoSmithKline waived the attorney–client privilege by sharing documents with external government relations and PR consultants.[114] The court, however, disagreed because GlaxoSmithKline's in-house attorneys:

> worked with these consultants in the same manner as they d[id] with full-time employees; indeed, the consultants acted as a part of a team with full-time employees regarding their particular assignments and, as a result, the consultants became integral members of the team assigned to deal with issues [that] . . . were completely intertwined with [its] litigation and legal strategies.[115]

Therefore, it found "no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attor-

111. *Id.* at 239.

112. *Id.* at 239-240 (concluding that privilege attached, but finding that the company did not take steps to maintain *Upjohn*'s requirement of confidentiality with respect to other employees). Similarly, in another case, the court protected all communications between the lawyer and an independent engineer hired to help develop an auto park because the engineer provided the attorneys with information necessary to obtain permits. MLC Auto. v. Town of S. Pines, No. 1-05-CV-1078, 2007 WL 128945, at *4 (M.D.N.C. Jan. 11, 2007) (implying that communications from attorney to engineer were covered because they helped consultant handle client-related tasks). Some courts do not take such a broad approach. *See, e.g.*, Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113-14 (S.D. N.Y. 2005) (denying functional equivalent status to consultant hired to help with debt restructuring because, among other things, the consultant provided services similar to that provided by any other financial consultant, did not use the office provided, spent more time in his own office in a separate city, and was able to "build a successful consulting business" at the same time that he worked for the company).

113. Twentieth Century Fox Film Corp. v. Marvel Enter., No. 01-Civ-3016, 2002 WL 31556383, at *2 (S.D.N.Y. Nov. 15, 2002) (finding that independent contractors providing production-related services for a company on temporary basis were functional equivalents because employment in movie industry is sporadic in nature and the use of independent contractors in this fashion was standard practice).

114. 294 F.3d 141, 143-144 (D.C. Cir. 2002) (seeking all "documents related to the manufacturing and marketing of Paxil").

115. *Id.* at 148 (internal quotations and citations omitted) (quoting *In re* Copper Market Antitrust Litig., 200 F.R.D. 2B, S.D.N.Y. (2001)).

neys in rendering legal advice."[116]

c. Who Hires the Consultant

Although some courts pay attention to who hires the third-party consultant (client or attorney),[117] even that distinction is not determinative.[118] For example, the *Kovel* court stated that the agency exception applied when *either* the attorney *or* the client hires the third party.[119] And courts have analyzed communications with third-party consultants under an agency theory when the consultants were hired by the client. [120] Similarly, to apply a functional equivalents analysis, courts have not required that the third party be hired by the client.[121]

C. THE LAW–BUSINESS DISTINCTION IN THE THIRD-PARTY CONTEXT

Courts protect communications that mix business and law as long as they are "predominantly legal"[122] or "made primarily for the purpose of generating legal advice."[123] This is because (a) business and law are often "intertwined" and difficult to distinguish;[124] and (b) even "the average lawyer—whether [in–] house or outside counsel—often mixes his legal advice with business, economic and political counsel."[125] Consequently,

116. *Id.* (internal quotations and citations omitted).

117. Cavallaro v. United States, 284 F.3d 236, 247-48 (1st Cir. 2002) (explaining that who hires the third party, and when, may be "probative" of an agency relationship but that it "need not determine whether, in all instances, the attorney or client . . . must hire the accountant in order to sustain a privilege under *Kovel*").

118. Many of the interviewees in the PR Study believed this to be a key factor and, therefore, have purposefully arranged for law firms to sign the hiring contracts. *See infra* note 332.

119. United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); *see, e.g.*, United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972) (explaining that it is immaterial who hired the consultant or if the consultant had previously provided services).

120. *See generally* Dorf & Stanton Commc'ns, Inc. v. Molson Breweries, 100 F.3d 919 (Fed. Cir. 1996). *See infra* notes 265-271 and accompanying text.

121. In *NXIVM Corp. v. O'Hara*, the consultant who was deemed a functional equivalent was a volunteer and not hired by either party. 241 F.R.D. 109, 139 (N.D.N.Y. 2007); *see supra* note 100 and accompanying text.

122. Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 794 (D. Del. 1954) ("When he acts as an advisor, the attorney must give predominantly legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice.").

123. McCaugherty v. Siffermann, 132 F.R.D. 234, 240 (N.D. Cal. 1990); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950) ("[T]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice."); United States v. Int'l Bus. Mach. Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974).

124. *See, e.g.*, Sedco Int'l v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977); 8 WIGMORE, *supra* note 70 § 2296; *see also* Murphy, *supra* note 12, at 581.

125. *NXIVM Corp.*, 241 F.R.D. at 126; Rattner v. Netburn, No. 88-Civ-2080, 1989 U.S. Dist. LEXIS 6876, at *15 (S.D.N.Y. June 20, 1989) (alteration in original); *United Shoe Mach. Corp.*, 89 F. Supp. at 360; John M. Burman, *Advising Clients About Non-Legal Factors*, WYO. LAWYER, Feb. 27, 2004, at 40, 40 (2004) ("[C]lients are in search of help with problems which they perceive . . . to involve legal issues. But they generally want more. No legal problem arises in a vacuum. . . . A client usually wants, therefore, advice about how to resolve the problem, in general, and not just the legal aspects of it. Resolving a problem

corporate lawyers pride themselves on their ability to provide integrated legal advice. [126]

However, determining whether the purpose of a communication was *primarily* for garnering legal versus business advice is particularly difficult in the corporate context, especially for in-house counsel because they usually play a multidisciplinary role.[127] As one general counsel interviewee in the PR Study explained, "It is not enough in an in-house position simply to say, well, here is the legal analysis and you make the business decisions. The business leaders and managers . . . want and they need recommendations from their lawyers that take into account the context of the business."[128] Additionally, courts fear that corporations use in-house attorney participation to create a zone of secrecy. [129] This is unsurprising given the tobacco companies' recent use of the privilege to shield studies conducted by external scientists about the addictiveness of tobacco.[130] Consequently, if the in-house attorney has non-legal duties, many courts require a higher showing that the attorney gave the advice in a legal capacity.[131] Some courts consider whether the communication expressly requests legal advice.[132] Others ask whether the communication would have occurred even if the client did not need legal advice[133] or if

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thus invariably involves non-legal issues."); Sisk & Abbate, *supra* note 45, at 36 (arguing that when "non-legal components of a communication are intertwined with genuine and material requests for or legal advice provided by corporate counsel, whether in-house or outside, the privilege should attach.").

126. As one law firm partner interviewee opined, "If you ask me to name five things you are most proud of as a lawyer, I would say one is that I tend to understand the business considerations and can give [legal] advice with that very much in mind." Interview with Law Firm Partner #49, at 10 (Apr. 7, 2009) (on file with author) (explaining that he "gives legal advice that has business impact").

127. U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994); *NXIVM Corp.*, 241 F.R.D. at 126; Beardslee, *Multidisciplinary Partnerships*, *supra* note 30, at 15 ("[The] job is multi-disciplinary and cross-functional by nature."); *id.* at 20 ("Most General Counsel have a broad range of responsibilities and perform a mixture of legal and non-legal work."); *see also* Murphy, *supra* note 12, at 581 ("The problem is especially pronounced . . . if the attorney is in-house counsel. . . ."); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002) ("Because . . . attorneys . . . performed the dual role of legal and business advisor, assessing whether a particular communication was made for the purpose of securing legal advice (as opposed to business advice) becomes a difficult task."); King, *supra* note 63, at 623; *see supra* notes 48-49 and accompanying text.

128. Interview with General Counsel #36, at 15 (Feb. 22, 2008) (on file with author).

129. First Chicago Int'l v. United Exch. Co., 125 F.R.D. 55, 57 (S.D.N.Y. 1989); *Hercules*, 434 F. Supp. at 143.

130. *See supra* note 15 and accompanying text.

131. *In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984); Borase v. M/A COM, Inc., 171 F.R.D. 10, 13-14 (D. Mass. 1997); McCaugherty v. Siffermann, 132 F.R.D. 234, 241 (N.D. Cal. 1990); Chambliss, *supra* note 54, at 1727; *see* Murphy, *supra* note 12, at 581 ("[S]ome courts . . . have imposed a heavy burden on corporations seeking to protect communications with persons holding dual legal/nonlegal rules.") (internal citations and quotations omitted); Pacini, Seay & Placid, *supra* note 44, at 901; King, *supra* note 63, at 623.

132. Allied Irish Banks v. Bank of Am., 240 F.R.D. 96, 101, 104 (S.D.N.Y. 2007).

133. *See, e.g.*, Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1423-24 (3d Cir. 1991); HPD Labs., Inc., v. Clorox Co., 202 F.R.D. 410, 415 (D.N.J. 2001); U.S. Postal Serv. v. Phelps Dodge Ref. Corp, 852 F. Supp. 156, 163-164 (E.D.N.Y. 1994); *First Chicago Int'l*, 125 F.R.D. at 57-58; Sexton, *supra* note 2 at 459.

there was no hope of privilege protection.[134] Some also consider whether a non-lawyer could have readily accomplished the task and whether the task was one normally tackled by attorneys. [135] Thus, when corporate attorneys consult with *internal* non-legal professionals, the business–law distinction becomes blurry.

The involvement of an *external* third-party consultant adds another layer of complexity. Consider the drug-recall hypothetical. It is hard to determine whether the lawyer is meeting with the external PR consultant to help manage media spin to protect the corporation's image and bottom line or to provide legal advice to protect its ability to negotiate with shareholders, attain a fair trial, or both. Although some courts resolve ambiguity in favor of protection, [136] others do the opposite.[137] The presence of a third-party consultant can overshadow whatever legal purpose exists for the communication. For example, in *Allied Irish Banks v. Bank of America*, the court refused to protect all documents created in *preparation* of a report on the internal investigation that was led by an independent financial services consultant and an outside law firm.[138] The court acknowledged that the investigation was a joint undertaking conducted in part so that the law firm could provide Allied Irish Banks (AIB) with legal advice about the potential criminal, regulatory, and civil liabilities that could ensue.[139] However, the court reasoned that all the documents

134. *Phelps Dodge Ref. Co.*, 852 F. Supp. at 160.

135. Oil Chem. & Atomic Workers v. Am. Home Prods., 790 F. Supp. 39, 41 (D.P.R. 1992); *see also* Murphy, *supra* note 12, at 581. *But see* Chore-Time Equip. v. Big Dutchman, 255 F. Supp. 1020, 1023 (W.D. Mich. 1966) ("The mere fact that non-lawyers could also have performed the services in question does not in any way destroy the privilege.").

136. *See* Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 146, 148 (D. Del. 1977) (resolving doubts in favor of plaintiff).

137. FTC v. TRW, Inc., 628 F.2d 207, 213 (D.C. Cir. 1980) (denying protection to a document that was prepared by a third-party consultant to enable the law firm to advise the client regarding application of the Fair Credit Reporting Act to its current procedures because the law–business distinction was ambiguous).

138. 240 F.R.D. 96, 102 (S.D.N.Y. 2007) (denying protection to "memos of Wachtell's investigation interviews [and] reports of attorney communications with the banks' Board of Directors" among other documents). The court's ultimate conclusion may indeed be accurate, especially since it appears that AIB failed to present supporting evidence that the documents aided the lawyer in providing legal advice. *Id.* at 104. However, as will be discussed *infra*, its reasoning is faulty.

139. *Id.* at 101. In today's post-Enron world, whether a corporation has conducted an internal investigation, cooperated, and/or voluntarily disclosed wrongdoing is considered by prosecutors when deciding whether to charge the corporation and can greatly impact the amount the corporation is fined if convicted of an offense. *See generally* Oren M. Henry, *Privilege? What Privilege? Culture of Waiver in the Corporate World*, 20 GEO J. LEGAL ETHICS 679, 684-86 (2007). *See also* Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and United States Att'ys (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (commonly known as the Thompson Memo); Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice to Heads of Department Components and United States Attorneys (January 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guide lines.htm; Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo In Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1106 (2006). The interviews with lawyers supported this. Interview with Law Firm Partner #40, at 7 (Aug. 22, 2007) (on file with author) ("[I]n the past five years, it's very clear that the companies that cooperate do better than those who don't."). *Id.* at 12-14

and notes in preparation of the report could not possibly be for the purpose of providing legal advice because the published report itself did not include legal advice and was not for the purpose of attaining legal advice.[140] Ironically, had the investigation been led solely by the law firm, the decision may have been different.[141] In short, inclusion of a third-party business consultant makes the law–business distinction more complex and may lead some courts to assume that the purpose of the communication is not to attain legal advice.[142]

Furthermore, in making the law–business distinction, some courts and scholars ask what type of advice the *third-party consultant* provided. They consider whether the consultant is providing typical as opposed to special services.[143] Similarly, some scholars contend that the attor-

("It's also very clear that the message that you are sending is: 'We are guilty if we say we are not going to waive the privilege.'"). However, recent revisions to the 2004 amendments to the Organizational Sentencing guidelines and the McNulty memo (which requires approval at a higher level before a request for waiver can be made) may change things. *See* Henry, *supra* note 139, at 684, 687 (explaining that the comment in § 8C2.5 that implied corporations had to waive privilege protection to lower culpability score in certain circumstances was deleted and discussing the McNulty memo). Moreover, if the recent proposals by the DOJ to revise its policy regarding how the Department will measure or demand cooperation are implemented, it may dissipate the culture of waiver. *See* Posting of the Joe Palazzolo to Blog of Legal Times, http://legaltimes.typepad.com/blt/2008/07/page/9/ (July 10, 2008, 13:52 CST) (explaining that these proposals are in response to the Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008), legislation introduced on June 26, 2008 by Senator Arlen Specter).

140. Allied Irish Banks v. Bank of Am., 240 F.R.D. 96, 101, 104-05 (S.D.N.Y. 2007) (denying protection in part because the investigator's actual report was not legal advice or for the purpose of legal advice but also asserting that privilege protection must also be denied because financial consultant was not translating client's communications); *id.* at 107 (observing that "critical public accountability concerns . . . motivated the commissioning of the Report," and concluding that they necessarily also motivated "the creation of the underlying investigatory documents").

141. *See supra* notes 117-119; *see infra* notes 330-333 and accompanying text. *Cf. In re* Vioxx Prods. Liab. Litig., MDL No. 1657-L, 2007 U.S. Dist. LEXIS 23164 (E.D. La. Mar. 5, 2007) (providing work–product protection to the preparatory documents and communications for investigation led solely by lawyers).

142. Court decisions like this, similar to those that do not uphold selective waiver agreements with the government, could discourage companies "from affirmatively investigating and reporting on irregularities, mistakes and outright wrongdoing" and, therefore, compliance. George J. Terwilliger, III et al., *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations*, 1592 PLI/CORP 163, 172 (2007). Indeed, one of the factors the SEC considers in leniency is "whether the company conducted or had an outside entity conduct an internal review." *Id.* at 168. If using an outside entity destroys privilege protection for documents underlying the report, companies may not use outside entities as frequently. Arguably, an attorney may be better able to investigate whether the corporation is complying with the law and recommend how to avoid legal action in the future with the help of a third-party consultant/investigator. The inclusion of an independent third party provides benefits perhaps not otherwise attainable, such as enhanced cooperation with employees, accuracy, and perspective. *Cf. infra* note 263 and accompanying text.

143. In one case, the court indicated that if the PR consultant only provides standard public relations services then the communication would not be covered. Haugh v. Schroder Inv. Mgmt, No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *7-9 (S.D.N.Y. Apr. 25, 2003). *See also In re* Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness, 265 F. Supp. 2d 321, 329 (S.D.N.Y. 2003) (distinguishing a case that did not protect communications with the PR consultant because,

ney–client privilege should only extend to certain types of third-party *specialists* as opposed to *regular* consultants.[144] On those same lines, others contend that communication should not be protected because the advice provided *by the third party* was not legal advice. [145]

D. The Role of the Work–Product Doctrine[146]

Although a full analysis of the work–product doctrine is outside the scope of this Article, this next section turns to it briefly to demonstrate that it is not an adequate substitute for the attorney–client privilege in the third-party context.

Like the third-party attorney–client privilege doctrine, the work–product doctrine was developed to account for the realities of modern practice and the importance of third-party consultation.[147] Generally, it protects tangible and intangible work product if it was prepared by an attorney or a representative or agent of the attorney [148] for litigation

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among other things, the PR firm provided ordinary PR advice); Murphy, *supra* note 12, at 585 (describing how courts consider the type of PR advice).

144. *See, e.g.*, Hantler et al., *supra* note 10, at 21-22 (claiming that the privilege should only cover litigation communication specialists and highlighting the skills and tasks that make these specialists "experts" compared to regular PR consultants).

145. *See, e.g.*, *Haugh*, 2003 U.S. Dist. LEXIS 14586, at *8 (analyzing whether advice the PR firm provided was traditional PR advice as opposed to legal advice). *See also* Murphy, *supra* note 12, at 587, 590 (arguing that communications with PR consultants should not be protected in part because they do not provide legal advice); *id.* at 591 ("Public relations consultants do not provide legal advice."). *See infra* note 304.

146. Courts consider the attorney–client privilege and work–product doctrine "inseparable twin issues" because "[w]henever the attorney–client privilege is raised in ongoing litigation, concomitantly the work product doctrine is virtually omnipresent." NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 126 (N.D.N.Y. 2007). Resultantly, courts are often imprecise when applying the two doctrines, relying on one to support the other. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 391-97 (1981) (relying on work–product cases to determine the scope of attorney–client privilege); *NXIVM Corp.* 241 F.R.D. at 138-39 (merging the analysis for both doctrines). Some use work–product to side-step attorney–client privilege issues. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657-L, 2007 U.S. Dist. LEXIS 23164, at *8 (E.D. La. Mar. 5, 2007) (deciding to not address the attorney–client privilege arguments because it found the communications were protected as work–product). This is problematic. Although work–product and attorney–client privilege doctrines are strongly allied, they are theoretically distinct. Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 150-51 (D. Del. 1977). The former is designed to protect the adversarial process, the latter to protect confidentiality so that communication can flow freely. *Id.* If courts do not consider the attorney–client privilege *ex post*, eventually it could affect the flow of information *ex ante*. Because there is the potential that the court will consider only the work–product doctrine (which is not absolute), communication between attorney and client might be chilled, thereby defeating the purpose of the attorney–client privilege. *See* United States v. Zolin, 491 U.S. 554, 562 (1989) (defining the central purpose of the privilege as "encourag[ing] full and frank communication between attorneys and their clients" (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981))).

147. United States v. Nobles, 422 U.S. 225, 238-39 (1975); Hickman v. Taylor, 329 U.S. 495, 500-01 (1947). Work–product is governed, in part, by Federal Rule of Civil Procedure 26(b)(3) and Federal Rule of Criminal Procedure 16(b)(2). *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 332.

148. Fed. R. Evid. 502(g)(2) ("['W]ork-product protection' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."). Federal Rule Of Civil Procedure 26(b)(3) states that

or "in anticipation of litigation."[149] According to courts, when attorneys work with third-party consultants "whose expertise and knowledge of certain facts can help the attorney in the assessment of *any* aspect of the litigation," work–product protection is not waived.[150]

However, the work–product doctrine does not moot the issues addressed in this Article for three reasons. First, work–product protection does not equate to attorney–client privilege protection. Unlike attorney-client privilege protection, work–product protection can be pierced with certain showings of need.[151] Second, the attorney–client privilege protects different circumstances than those protected by the work–product doctrine. [152] Today, many legal battles are fought and won before a case is even filed,[153] yet courts generally interpret the "anticipation of litigation" requirement narrowly and do not consider the remote possibility of litigation to be in anticipation of litigation.[154] Therefore, in the drug-recall scenario, the communications between the general counsel and the

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it protects "the mental impressions, conclusions, opinions, or legal theories of [the] attorney *or other representative of a party* concerning the litigation." FED. R. CIV. P. 26(b)(3)(B) (emphasis added); *In re* Cendant Corp., 343 F.3d 658, 661-62 (3d Cir. 2003); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2024 (2d ed. 1998 & Supp. 2009); *see also* FED. R. CIV. P. 26(b)(3)(A) (defining "another party or its representative" as "including the other party's attorney, consultant, . . . or agent").

149. Linde Thomspon Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1515 (D.C. Cir. 1993). Importantly, "the existence of litigation is not a prerequisite; materials qualify for work–product protection if the primary purpose for their creation was related to potential litigation." *In re Vioxx*, 2007 U.S. Dist. LEXIS 23164, at *10 (internal quotations omitted).

150. *NXIVM*, 241 F.R.D. at 128 (emphasis added). However, work–product protection does not apply to third-party consultants that are identified as experts to present opinions at trial. FED. R. CIV. P. 26(b)(4) (explaining that such testifying experts can be deposed).

151. *NXIVM*, 241 F.R.D. at 126-27; *see also* FED. R. CIV. P. 26(b)(4); *Nobles*, 422 U.S. at 238 n.11; *Hickman*, 329 U.S. at 512. Some state courts allow the attorney–client privilege to be pierced upon showings of need and relevance. *See, e.g.*, Payton v. N.J. Tpk. Auth., 678 A.2d 279, 288 (D.N.J. Super. 1996); Leonen v. Johns-Manville, 135 F.R.D. 94, 100 (D.N.J. 1990) (applying state law).

152. Although Professor Edward J. Imwinkelried asserts that the attorney–client privilege is "hardly necessary," and that courts have "severely restricted discovery of work product material from experts not called as trial witnesses," he delineates some of the same problems with the third-party attorney–client privilege doctrine highlighted here. Imwinkelried, *supra* note 10, at 49.

153. *See* Ad Hoc Committee on the Future of the Civil Trial of the American College of Trial Lawyers, *The "Vanishing Trial:" the College, the Profession, the Civil Justice System*, 226 F.R.D. 414, 433 (2005) (explaining how alternative dispute resolution, especially arbitration, is "replacing the civil trial in court."); Ellis, *supra* note 53, at 15-16 (noting the prominence of alternative dispute resolution and the often prohibitive cost of litigation); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 519 (2004) (explaining that a significant number of case are now being resolved by alternative dispute resolution and mediation instead of trial).

154. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1977) (explaining that the "remote prospect of future litigation" is not "in anticipation of litigation" and is not work–product); Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974) (holding that the remote possibility of litigation does not meet this requirement); Patricia L. Andel, *Inapplicability of the Self-Critical Analysis Privilege to the Drug and Medical Device Industry*, 34 SAN DIEGO L. REV. 93, 102 (1997) ("[T]he requirement that the information be compiled 'in anticipation of litigation' has been interpreted narrowly.").

drug-recall crisis team might not be considered to have occurred in anticipation of litigation.[155] Similarly, when an attorney meets with an accountant to discuss the structure and purpose of a transaction and potential tax consequences, the communication might not be considered to have been made in anticipation of litigation if subsequent litigation arises[156]—even though litigation often occurs after a high profile deal concludes.[157] Importantly, unlike the attorney–client privilege, the work–product doctrine does not generally protect advice given before the alleged misconduct—advice that may actually guide a client to compliance.[158] Also, many legal services are provided without the prospect of

155. *Cf.* Moses, *supra* note 15, at 1839 ("[M]ost public relations work starts well in advance of indictment, let alone a possible trial. . . .").

156. This is problematic. If the communications are not protected from discovery by the work–product doctrine or attorney–client privilege, they "point out to the IRS the problems with the tax return and increase exposure to liability." Jones, *supra* note 51, at 455; *Cf.* United States v. Arthur Young & Co., 465 U.S. 805, 812-16 (1984) (rejecting an accountant–client privilege protecting accountant's tax accrual work papers); Gruetzmacher, *supra* note 12, at 993 (explaining that the work–product doctrine "provides little protection for communications among a client, lawyer, and accountant in connection with the planning and execution of a tax-advantaged transaction"); *but see* Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1205 (Mass. 2009) (protecting a document prepared by tax consultants to "discuss the pros and cons of the various planning opportunities and attendant litigation risks" in order to help the client decide whether it should refrain from paying corporate excise taxes that would result in "substantial capital gains"). Further, some accountants cannot be protected by the work–product doctrine because of the potential conflict of interest between providing an independent audit and advocacy. Pacini et al., *supra* note 44, at 895.

157. Lawyers work under this assumption because litigation can occur "over any number of issues including alleged failure to close transactions; breaches of representations and warranties; securities and common law fraud; and contractual purchase price adjustments." Debevoise & Plimpton LLP, M&A/Fiduciary Duty Litigation, http://www.debevoise.com/areasofpractice/ServiceDetail.aspx?id=3ef585a3-d831-4924-96f1-0aca8db01af0&type=showfullDesc (last visited June 13, 2009); Interview with Law Firm Partner #49, at 4, 7, 9 (Apr. 7, 2008) (on file with author) (claiming that litigation occurs after a deal is done almost fifty percent of the time but that "M&A is decided by dollars and cents not by litigation. Litigation can buy time. Litigation can create unpleasantness. Litigation can occasionally stop a deal but it's rare."); Interview with General Counsel #2, at 25 (Feb. 4, 2008) (on file with author) (explaining that in a hostile takeover or M&A, work–product protection is less likely because the deal was not in anticipation of litigation, "although certainly one could see that litigation might arise").

158. *Cf.* Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desireability*, 102 HARV. L. REV. 567, 569 (1989) (emphasizing the importance of *ex ante* advice and contending that *ex post* advice during litigation "cannot guide behavior for the simple reason that such advice is given only after individuals have chosen how to act"). Moreover, the fact that a consultant provided such *ex ante* advice may prevent work–product protection or protection under Federal Rule of Civil Procedure 26(b)(4)(B) for work done by those consultants after litigation ensues, unless care is taken to distinguish the two roles. *See, e.g.*, Hexion Specialty Chems., Inc. v. Huntsman Corp., C.A. No. 3841-VCL, 2008 WL 3878339, at *3 (Del.Ch. Aug. 22, 1008)) (denying protection under Federal Rule of Civil Procedure 26(b)(4)(B), the attorney–client privilege, and work–product doctrine and explaining that Huntsman should not be able to protect communications with Merrill Lynch financial consultants that occurred prior to litigation "by the simple expediency of purporting to hire the same team of Merrill Lynch employees as its counsel's so-called litigation consultants"). Although it may make perfect business sense to use the same advisors or the same financial advising company to perform both roles, courts may suspect that the corporation is "trying to use the rule to shield testimony by a natural fact witness" and not apply work–product protection or protection

litigation, such as preparations for an administrative proceeding,[159] legal advice on disclosure statements,[160] press tactics, or income tax returns.[161]

Lastly, when documents are prepared in anticipation of litigation for both litigation and business purposes, they may not be protected.[162] For example, in the drug-recall hypothetical, even if a court determined that the meeting was in anticipation of litigation, it might not provide work–product protection to either of the documents prepared by the external PR consultants because the court might determine that they were not designed primarily to assist in the pending litigation, but instead to assess how to best manage negative publicity.[163] In one case, the court held that the attorney–client and work–product doctrines were waived

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under Rule 26(b)(4)(B). *Id.* at *3 (explaining that in cases that protected post litigation consultations with a financial consulting firm that was used prior to litigation, dual representation was protected because different analysts were used and/or there was a clearly defined separation between the financial and litigation advisory roles).

159. *See* Gruetzmacher, *supra* note 12, at 991-92 (explaining that work–product protection would not apply).

160. In a typical securities fraud lawsuit, the communications between the client, lawyer, and any third-party consultant leading up to disclosure of the client's future growth prospects would likely not be considered to be in anticipation of litigation because the lawsuit does not occur until after there is a drop in stock value, which may not occur, if at all, for months or years after the original projection.

161. Thus, Professor Imwinkelried's conclusion that some communications do not need to be protected by the attorney–client privilege because they will be protected by the work–product doctrine is inapplicable outside the anticipation of litigation context. *See* Imwinkelried, *supra* note 10, at 48-49.

162. *In re* Om Group Sec. Litig., 226 F.R.D. 579, 586-87 (N.D. Ohio 2005) (explaining that dual purpose documents "would have been generated in the absence of pending or possible future litigation"). In *In re Om*, the court ultimately privileged the documents but explained that this is not a certain result since there were business and litigation purposes that could not be separated. *Id.* at 587, 594.

163. In *Rattner v. Netbaun*, the court refused work–product protection of a public announcement crafted by the attorneys because the document—although it had potential use in pending litigation— was also prepared to bolster the corporation's image. Rattner v. Netburn, No. 88-Civ-2080, 1989 U.S. Dist. LEXIS 6876, at *18-19 (S.D.N.Y. June 20, 1989); *see also* Kyle Kveton, *Advice and Counsel: The Question of Whether a Lawyer Has Given Legal or Nonlegal Advice Is Highly Fact-Specific*, L.A. LAW., Sept. 2006, at 31, 36 ("[W]ork product protection may not extend to business strategy or public relations plans. . . ."). Although some courts protect documents if they "were prepared *because of* existing or expected litigation," others do so only if they were prepared "primarily to assist in litigation," which is a higher standard. United States v. Adlman, 134 F.3d 1194, 1195, 1198 (2d Cir. 1998) (explaining that work–product protection applies when "a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation); *id.* at 1198 (stating that the "primary purpose" test "would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate . . . purpose is to assist in making the business decision" whereas the "because of" test enables protection for "such documents, despite the fact that their purpose is not to 'assist in' litigation"); *see also* Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 67 n.8, 68 (1st Cir. 2002) (adopting the "because of" standard and noting that the Fourth, Eight, D.C., Seventh, and Third circuits have adopted the "because of" standard); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002) (explaining that a court will deem a document to have been prepared in anticipation of litigation "if in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation" and that Rule 26(b)(3) does not "state that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product, much less *primarily or exclusively* to aid in litigation. Preparing a document 'in anticipation of

because confidential information was shared with the PR firm not to aid the attorneys in litigation, but rather to control media spin,[164] despite the fact that the way a trial is spun can affect judges' and juries' decisions. [165] In a recent case involving a failed merger, a court held that work–product protection did not apply to consultations with financial advisors because the "presentations are similar to presentations one would expect from a company's financial advisors in the context of a disputed merger agreement."[166] Although the court admitted that "some of those presentations address questions raised by the outbreak of litigation," it found that "the advice relates to business issues rather than to the conduct or defense of litigation" and that the financial advisors were acting as financial advisors instead of in some "other capacity." [167] In sum, many of the same problems inherent in making the law–business distinction in the attorney–client privilege context exist when the work–product doctrine is involved. Thus, when consultation with third parties is not covered by the attorney–client privilege, it often does not fall within the protective shadow of the work–product doctrine either.[168]

III. ANALYSIS OF THE EXCEPTIONS

Although this Article assumes that the attorney–client privilege applies to corporations as it has since 1915, the risks and benefits associated with having a corporate attorney–client privilege are relevant to deciding how and when third-party communications should be protected and analyzing the effectiveness of the current doctrine. The risks often discussed in the literature and in case opinions are corporate misconduct and a shield

litigation' is sufficient." (quoting *Adlman*, 134 F.3d at 1198, 1202) (internal quotations omitted)).

164. NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 142 (N.D.N.Y. 2007); *see also* Burke v. Lakin Law Firm, PC., No. 07-CV-0076-MJR, 2008 U.S. Dist. LEXIS 833, at *8 (S.D. Ill. Jan. 7, 2008) (denying protection of emails sent between client and PR firm because they "discuss preparation and strategy for minimizing the public relations fallout that could result from the pending litigation . . . . [The work–product doctrine] does not protect documents that were merely prepared for one's defense in the court of public opinion."); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) ("[T]he purpose of the [work–product doctrine] is to provide a zone of privacy for strategizing about the conduct of the litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally."). Under the narrow interpretation of the agency exception, a court would have denied protection but under a broad interpretation it might have protected the communication if it somehow facilitated the lawyer's provision of legal services.

165. *See generally* Beardslee, *Advocacy Part I*, *supra* note 6, at 9-20. *See also infra*, note 185 and accompanying text.

166. *Hexion Specialty Chems., Inc.*, 2008 WL 3878339, at *4 (rejecting Huntsman's argument that "Merrill Lynch would have had no reason to create its post [litigation] work product in the absence of pending or anticipated litigation").

167. *Id.*

168. The work–product doctrine provides even less protection in state courts because some "confine absolute work product protection to written material reflecting the attorney's personal mental impressions and legal theories." Imwinkelried, *supra* note 10, at 21 (explaining that work product does not protect communications between attorneys and non-testifying experts in many states). In federal courts, however, the work–product doctrine protects tangible and intangible work product. *See* sources cited *supra* note 148.

against discovery of information.[169] The benefits often discussed are informed decision-making and increased compliance.[170] Also, frequently integral to the analysis are concerns about predictability and clarity.[171] Arguably, third-party attorney–client privilege doctrine should seek to restrict the risks and wreak the benefits in a way that is consistent with the spirit of the corporate attorney-client privilege. Therefore, the next sections use these criteria to assess the existing approaches to the third-party doctrine. When these criteria are considered, it becomes clear that, at the margins, third-party attorney–client privilege doctrine today is at once overly broad and overly narrow. Moreover, it is unpredictable.

A. The Narrow Approach Is Too Narrow

The narrow interpretation of *Kovel*, although predictable, is not the appropriate standard to apply to communications between attorneys and third-party consultants.

1. Not in Keeping with the Spirit of the Doctrine

Significantly, it is not clear that the original *Kovel* decision was supposed to be read as narrowly as the Second Circuit did in *Ackert* thirty-eight years later. [172] First, in limiting *Kovel* to only applying protection to

169. One of the main arguments that opponents to the corporate attorney–client privilege make is that it creates a zone of secrecy. *See, e.g.*, Alexander, *supra* note 14, at 195 ("In a large corporation, cloaking all such communications with an inflexible privilege may produce a veil of darkness so impenetrable in some cases as to preclude effective discovery of the truth."). Opponents also often support their position by highlighting the tactical costs associated with the zone of secrecy. *Id.* at 229 (explaining that "unearthing corporate knowledge may be quite difficult" and may require "depositions of numerous directors, officers and employees" (internal quotations omitted)).

170. *See* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) (explaining the importance of balancing these "two conflicting forces"); NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 125 (N.D.N.Y. 2007) ("The free-flow of information and the twin tributary of advice are the hallmarks of the privilege. For all of this to occur, there must be a zone of safety for each to participate without apprehension that such sensitive information and advice would be shared with others without their consent."); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977) ("In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communications of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity."); Tanina Rostain, *The Emergence of "Law Consultants"*, 75 Fordham L. Rev. 1397, 1426 (2008) ("[T]he importance of the attorney-client privilege is premised on its capacity to further social values[,] . . . not only . . . to assist counsel in formulating legal advice . . . [but also] to create a zone of privacy . . . to convince corporate clients to abide by the law."); *see also* sources cited *infra* note 194. Opponents claim that full and open communications with attorneys would still occur even if the attorney–client privilege did not apply to corporations because business professionals have to disclose information to lawyers in order to make good business decisions. *See* Alexander, *supra* note 14, at 225-26; Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolfinbarger*, 55 Bus. Law. 735, 739-42 (2000); *see also infra* note 187.

171. *See infra* Part III.D.

172. *See* United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999).

third-party interpreters,[173] the Second Circuit relied primarily on two older decisions that do not support the narrow interpretation. [174] Second, the facts in *Ackert* are meaningfully different from those in *Kovel*. In *Ackert*, it was not apparent that the third-party consultant had been hired to help with the specific project for which the attorneys were providing legal services.[175] Lastly, given the language of *Kovel*, the court likely considered its holding applicable to other situations where the "assistance of the[ ] agents [is] indispensable to [attorneys'] work." [176] *Kovel* was justified based on the realities of modern practice at the time. The "complexities of modern existence" today make it even more difficult than it was in 1961 to "handl[e] clients' affairs without the help of others." [177]

If it is true, as this Article posits, that attorneys sometimes have to consult with third-party specialists in order to provide integrated legal advice, the Second Circuit's reading of *Kovel*—even if accurate—is too narrow today. When applied literally, it bars protection for most communications with most third-party consultants because: (a) companies usually do not need to hire third parties to assist their own employees in communicating with their attorneys; and, (b) consultants are hired primarily for their cumulative knowledge and expertise.

Even the few third-party consultants most often protected by courts—like doctors,[178] auditors, and accountants,[179]—are not merely transmitting information into a more understandable language or functioning as a set of merely ministerial agents. They are, as Professor Edward J. Im-

173. *See, e.g.*, Blumenthal v. Drudge, 186 F.R.D. 236, 243 (D.C. Cir. 1999) (denying protection because litigation consultant "was retained for the value of his own advice, not to assist the defendant's attorneys in providing their legal advice"); U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 162 (E.D.N.Y. 1994); *see also* Occidental Chem. Corp. v. OHM Remediation Servs. Corp., 175 F.R.D. 431, 437 (W.D.N.Y. 1997) (rejecting application of privilege to engineering consultants in part because consultants relied on information not obtained from client).

174. The court relied on a passage in *Hickman v. Taylor* that explains that information that an attorney procures from witnesses in anticipation of litigation is not covered by the attorney–client privilege, but rather by the work product doctrine. *See* Ackert, 169 F.3d at 139 (citing Hickman v. Taylor, 329 U.S. 495, 508 (1947)). It also relied on *Colton v. United States*. *See id.* There, however, the defendant conceded that third parties were not covered and failed to assert any theory upon which to justify the privilege. Colton v. United States, 306 F.2d 633, 639-40 (2d Cir. 1962) (commenting that the principle behind the admittance is "obvious").

175. *See* Byrnes v. Empire Blue Cross Blue Shield, No. 98-Civ-8520, 1999 WL 1006312, at *2 (S.D.N.Y. Nov. 4, 1999) (distinguishing *Ackert* on this basis).

176. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) (internal citations and quotations omitted). When *Ackert* was written, the three judges that wrote *Kovel* had been dead for over ten years.

177. *Id.* (internal citations and quotations omitted); *see supra* notes 51-59 and accompanying text.

178. Courts reason that the doctor is the conduit and "the client is the source of . . . information" that "reveals intensely personal information to enable the [doctor] to translate the data," (the patient's condition), "into a form usable by the attorney." Imwinkelried, *supra* note 10, at 24-29; *accord* People v. Lines, 531 P.2d 793, 800 (1975); City & County of S.F. v. Superior Court, 231 P.2d 26, 31 (1951).

179. *See, e.g.*, United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (protecting communication with accountant); United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963) (same); United States v. Schmidt, 360 F. Supp. 339, 346-48 (M.D. Pa. 1973) (same).

winkelried points out, "add[ing] an important increment of [their own] knowledge to evaluate the client's communications and other case-specific information."[180] For example, auditors conduct trend analyses and make judgments about the company's calculations when they certify that the company's financial statements are not materially misstated and are in accordance with applicable accounting standards.[181] Ironically, even accountants (the type of third-party consultant originally protected by *Kovel*) do more than put the client's information into a more usable format.[182] As claimed by scholars and judges alike, "[o]n closer scrutiny, the [translator] analogy breaks down."[183] Hence, the narrow interpretation of *Kovel*, although more predictable, is under-inclusive and borders on pretense.

Interestingly, courts that adhere to a narrow reading of *Kovel* recognize that "[e]ven the most proficient and prolific attorneys have to resort to consultation with others in order to render full and complete legal services to their clients." [184] For example, in a case involving an external PR firm, the court acknowledged that:

> the public relations firm [might] need[ ] to know the attorney's strategy in order to advise as to public relations, and the public relations impact [might] bear[ ], in turn, on the attorney's own strategizing as to whether or not to take a contemplated step in the litigation itself, and if so, in what form.[185]

But because these considerations are not taken into account when applying the narrow version of *Kovel*, the court would not privilege any of the communications between the lawyer and the external PR agents. [186] Sim-

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180. Imwinkelried, *supra* note 10, at 31, 36, 37 ("The expert creates new information and thereby becomes an independent source of information about the case.") (internal quotations and citations omitted)); *see, e.g.*, United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976) ("[T]he doctor's observations and conclusions are based upon far more than the client's communications.") (citing Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 463-64 (1962)); *see also* NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 141 (N.D.N.Y. 2007) (explaining that PR consultants do not meet the test outlined in *Kovel* and categorizing the *Kovel* and *Ackert* tests as "narrowly tailored"); Gruetzmacher, *supra* note 12, at 980 (explaining that business advisors "do not translate information from the client to the attorney; rather, they provide information independently to the attorney").

181. *See* United States v. Cote, 456 F.2d 142, 143-44 (8th Cir. 1972) (applying a broader interpretation of *Kovel* to protect communications with auditor).

182. For example, when the accountant does a quality of earnings analysis about an acquisition candidate, the accountant analyzes and evaluates the significance of the information gleaned from the client and other sources. *See* Black & Decker Corp. v. United States, 219 F.R.D. 87, 90-91 (D. Md. 2003) (same); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) (holding that communications between a lawyer and an accountant were not privileged because the accountant did more than translate).

183. Imwinkelried, *supra* note 10, at 36; *accord* United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976) (noting that relying on the interpreter analogy to extend privilege to psychiatrists is "not beyond criticism").

184. *NXIVM*, 241 F.R.D. at 140-41.

185. Calvin Klein Trademark Trust v. Wachner (*Calvin Klein I*), 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (applying the narrow agency theory).

186. *Id.* at 54-55.

ilarly, a court taking a narrow approach to *Kovel* would not privilege any of the communications involved in the drug-recall scenario. In all of the documents and recommendations, the external PR consultant provides information and advice of his or her own. Not even the notes taken by the external PR consultant can be said to serve a translator function. Moreover, even if all the attorneys' comments on the draft press release were specific legal advice, they would not be protected under the narrow approach because confidentiality was breached by sharing the draft press release with the third-party consultant.

2. *May Result in Less Informed Decision Making*

Evidence suggests that lawyers, even if they truly need the advice, might not resort to third-party consultation if they know beforehand that by doing so they waive protection in all situations other than when the third-party translates.[187] For example, preliminary findings from the PR Study suggest that absent the possibility of protection, general counsels would either refrain from revealing confidential information or forego third-party consultation with PR consultants altogether. [188] As one outside attorney vividly exclaimed, such a rule would "put the PR people out of business in all litigated matters—no one would hire them." [189]

This is problematic for several reasons. First, the deterrent effect is placed at the wrong point in the decision-chain. The effect is to discourage lawyers from seeking needed guidance, but it is not the attorneys' privilege to lose. Lawyers would have to inform clients that they wanted third-party expertise but that any shared information would be discoverable.[190] Knowing what this means, lawyers might have to counsel the cli-

187. *See, e.g.*, Gruetzmacher, *supra* note 12, at 978 ("[N]o competent attorney would engage in confidential communications with a . . . representative of a client unless he were certain the privilege would apply."). Admittedly, this evidence is from the corporate bar and, therefore, is subjective. However, as Professor Lonnie Brown stated in the context of compelled waivers, "[w]hether real or imagined, that belief alone could prove to be a self-fulfilling prophecy, which is enough to establish the existence of a very real problem." Brown, *supra* note 63, at 946; *accord* Henry, *supra* note 139, at 689; Imwinkelried, *supra* note 10, at 27 (explaining that denying all protection to experts used for pretrial preparation "deters thorough pretrial investigation"). A common argument against the corporate attorney–client privilege is that businesses "are forced by circumstances and impelled by business necessity to resort to lawyers," and "[t]he benefits [of communicating with counsel] outweigh the risks." Brown, *supra* note 63, at 924; *see supra* note 170. However, this is not necessarily true of third-party consultation. It may not be worth the risk to the lawyer because discovery that an attorney ignored a consultant's advice, even if it was a logical decision, could have drastic consequences in court. On the other hand, if the attorney and the corporation have already decided to do something risky or illegal, they likely would not engage the consultant even if the privilege would protect the communication. *See infra* note 194 (discussing the value of the corporate attorney-client privilege in promoting free flowing communication).

188. *See, e.g.*, Interview with General Counsel #42, *supra* note 50, at 21.

189. Interview with Law Firm Partner #53, *supra* note 41, at 3.

190. *See, e.g.*, Interview with General Counsel #42, *supra* note 50, at 21 (stating that "[he] would owe it to [his] client to tell them that" and that the client would likely not want the general counsel to talk to the external PR consultant). Arguably, given the state of the doctrine, attorneys should be making these types of warnings today. Some scholars and practitioners contend that malpractice suits can arise out of nonlegal advice provided by

ent against third-party consultation even if the lawyer believed he or she could provide better legal advice with the consultation.

Second, a narrow rule may result in less adequate legal services. For example, if the narrow reading of *Kovel* is *the* standard, tax shelter transactions will continue to occur, but lawyers may choose not to consult with accountants (who often know more than lawyers do about tax shelters); therefore, clients may not get the best advice.[191] Alternatively, consultation might still occur, but less openly. For instance, in the drug-recall scenario, the executives at the senior strategy meeting may be more hesitant to share information with the external PR agency.[192] As one general counsel interviewee commented, "if people are scared to talk in meetings because they are afraid it's going to be discovered someday then you don't [get] good advice . . . and you don't make good decisions if you don't get good advice."[193] Essentially, when people are not armed with the full story, decision making is impeded and the risk of liability is increased. Many of the general counsel interviewees expounded that "if PR people don't have a full understanding of a story," they "can't make decisions [sic] that are made properly."[194] For example, PR consultants

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lawyers. *See, e.g.*, Kveton, *supra* note 163 at 32; John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 77 (2002) (finding "a basis in contract and malpractice law for requiring attorneys to tend to their clients' interests in the court of public opinion as zealously as they do in courts of law").

191. *See* Gruetzmacher, *supra* note 12, at 994 (making a similar point with respect to attorneys consulting accountants). Since the narrow interpretation denies protection to almost all third-party consultants, in those states where courts apply a narrow interpretation of *Kovel* and deny work–product protection for the intangible, attorneys may be unable to adequately prepare for trial. *See* Imwinkelried, *supra* note 10, at 28 (citing commentators that claim rejecting protection to all third-party experts "deals a crippling blow to pretrial investigation and makes it virtually impossible to prepare adequately for trial" (internal quotations and citations omitted)). Further, attorneys may then prefer to seek advice from biased experts so that if the expert communications are disclosed they have more potential to be in the client's favor. *See id.* at 28. These two points do not resonate as much in the federal context because there the work–product doctrine applies to both tangible and intangible materials.

192. Another potential unanticipated consequence might be for corporate executives to exclude lawyers from engaging in the multidisciplinary teams to avoid the risks that (a) the lawyer will disclose confidential, strategic legal information that could later be construed as a waiver of the privilege and (b) opponents will know to seek discovery of communications because the presence of the attorney indicates the importance of the meeting and that potentially useful confidential information about the controversy was discussed.

193. Interview with Law Firm Partner #40, *supra* note 60, at 16; *see supra* note 34; *see also* Interview with General Counsel #3, *supra* note 36, at 6 ("They have to know what's going on in order to give you good advice.").

194. *See, e.g.*, Interview with General Counsel #2, at 21 (Feb. 4, 2003) (on file with author); Interview with General Counsel #26, at 27 (Feb. 11, 2008) (on file with author) ("I don't think it's fair to give them only a part of the story, they can't contribute I don't think as well if they're limited."); Interview with General Counsel #39, at 68 (Apr. 26, 2007) (on file with author) ("If you keep people in the dark, they end up being mismanaged."); Interview with Law Firm Partner #40, *supra* note 60, at 15 ("[Y]ou can't really have comfortable candid conversation with [the PR consultant] if you know that you may be waiving the privilege."). Proponents of the corporate attorney–client privilege often assert that "even if . . . the modern corporation has no choice but to communicate with attorneys, a corporate privilege still might serve to make those communications that do occur more candid and truthful, as well as to prevent corporate employees from simply refraining from sup-

may sugar-coat something, like a consent decree, that should be addressed more candidly so that regulators do not bring additional charges.[195] Or "they may inadvertently say something that they're not supposed to,"[196] which could be construed as an admission, false exculpatory statement, or statement later found inconsistent.[197] Whether it is less information sharing or refusal to consult altogether, the effectiveness

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plying information." Sexton, *supra* note 2, at 465 (internal quotations omitted). *See also* Chambliss, *supra* note 54, at 1754-55 ("[M]ost lawyers and corporate officials believe that the privilege does, in fact, promote candor in attorney–client communications, especially as to potential litigation and other 'sensitive' matters."). As the general counsel of Johnson and Johnson is reported as stating, "without the privilege, you discourage the necessary level of trust and open communication between business people and lawyers that is necessary for good decision making." *Johnson & Johnson—True to Its Credo*, THE METRO. CORP. COUNSEL, Jan. 2007, at 55, *available at* http://www.metrocorpcounsel.com/pdf/2007/January/01.pdf. A general counsel interviewee of a large pharmaceutical company explained,

> I am a big believer in the privilege. You know when you read some of these opinions on the privilege and they say the privilege prevents people from finding out what's really going on inside the world. I think they have it completely backwards. The privilege is what allows my clients to come to me in the worst times and tell me honestly, that they have done something that they are worried about.

Interview with General Counsel #42, *supra* note 50, at 21. This sentiment is supported by the fact that even the two interviewees who claimed there was less risk of disclosure for M&A deals due to professional courtesy and alleged recognition by some Delaware courts of a "deal privilege" stated they would be less forthcoming with external PR consultants if the narrow approach was adopted. *See, e.g.*, Interview with Law Firm Partner #49, *supra* note 37, at 11; Interview with General Counsel #2, *supra* note 157, at 23. *See also infra* notes 280-281.

195. Interview with Law Firm Partner #40, *supra* note 60, at 22.

196. *Id.*; *see also* Interview with General Counsel #2, *supra* note 157, at 11-12 (explaining that even when a company is innocent of charges, something that is said in the paper might lead to an investigation for internal control problems under Rule 404 which "could lead to both civil or regulatory liability").

197. *See* Kevin C. McMunigal, *The Risks, Rewards, and Ethics Client Media Campaigns in Criminal Cases*, 34 OHIO N.U. L. REV. 687, 690 (2008). Consider the recent Roger Clemens scandal. *See generally* Gordon Edes, *Clemens Implicated in Steroid Scandal by Trainer*, THE BOSTON GLOBE, Dec. 14, 2007, *available at* http://www.boston.com/sports/baseball/articles/2007/12/14/clems_implicated_in_steroid_scandal_by_trianer/. It is impossible to know what information Clemens shared with his attorney or his PR representatives or when. However, it does not appear that PR executives were consulted early on or that, when they were consulted, they were given the whole story. Testifying before Congress damaged Clemens's reputation and professional future and could have subjected him to perjury charges. Whether he lied or not, it appeared that he lied. Hypothetically, had his attorney wanted to convince Clemens not to testify, he may have been able to do so armed with the information a PR executive could supply about the potential ramifications of denying steroid use before Congress after a long period of silence. Alternatively, if the attorney was unsuccessful in convincing Clemens not to testify, he may have helped Clemens decide to make a public denial earlier, before the hearings began (if a denial was truthful). *See* Marene Gustin, *Does Your Business Need A Crisis Plan?*, DAILY COURT REVIEW ON THE WEB, Jan. 29, 2008, http://www.dailycourtreview.com ("By delaying his press conference in the wake of the Mitchell Report about steroid abuse in major league baseball [Clemens] gave bloggers and the mainstream media time to come to their own conclusions."). In both situations, the attorney would have provided better legal advice because the business repercussions (gleaned, in part, from communications with the PR executives) would have been incorporated. Then again, it could be that Clemens's attorney consulted with PR executives and did not receive good advice or was unable to convince Clemens to take good advice.

of the legal advice and the client's best interests may be at risk.[198]

3. *May Discourage Corporate Misconduct but Not Enhance Discovery*

As discussed above, under the narrow rule, few, if any, communications with third-party consultants can legitimately be predicted to receive privilege protection. Therefore, to its credit, the narrow approach does not enable corporate misconduct or support a lawyer's inclination to take a broad approach to the corporate attorney–client privilege. Despite this advantage, however, it is not apparent that discovery will be enhanced, that is, that more accurate information will flow to the public with such a narrow rule.[199] For example, general counsels in the PR Study explained that the dialogue that occurs between the PR consultant and the attorney balances the attorney's instinct to limit exposure and the PR consultant's desire to divulge. [200] True, the issue may be spun in the media even if lawyers are not involved. However, because the facts surrounding legal issues are often complicated and hard to communicate to a lay audience, an open dialogue between attorneys and PR consultants may enable more specific and more accurate information to reach the public.[201] Denying protection, therefore, may lead to an altogether different zone of secrecy—one in which corporations mouth generalities and hold back specific information or worse, one in which the typical response is "no comment." One general counsel interviewee explained the effect a very narrow rule would have had on a prior legal controversy:

> It would [have] put a larger wall between PR and Legal. There would [have] be[en] less communication between the people . . . . [W]e would have probably fallen back more often on "No Comment." So then the interests of the world would have been less served, presuming that the world has an interest in having information. The world would have gotten less of the story, and frankly more of a misunderstanding of what had actually happened would have been promulgated.[202]

The 2001 Fair Disclosure Regulation (Reg FD) has had a similar ef-

198. Another potentially damaging consequence of such a narrow rule is that counsel may try to fill in the gaps—despite not being qualified to do so. This harms the client and could undermine the lawyer's reputation.

199. Opponents to the corporate attorney–client privilege often support their stance by claiming that more information will be discoverable without a corporate attorney–client privilege. *Cf.* Alexander, *supra* note 14, at 195 ("In a large corporation, cloaking all such communications with an inflexible privilege may produce a veil of darkness so impenetrable in some cases as to preclude effective discovery of the truth.").

200. *See, e.g.*, Interview with General Counsel #42, *supra* note 50, at 9; Interview with General Counsel #37, at 12 (Feb. 8, 2008) (on file with author).

201. According to many of the interviewees, the media "tends to oversimplify complex issues" and "get the facts and details wrong" when left to their own devices. *See, e.g.*, Interview with Law Firm Managing Partner #59, *supra* note 43, at 21. For further discussion of the role corporate attorneys play in managing media spin around legal issues, see generally Beardslee, *Advocacy Part I*, *supra* note 6, at 9-20.

202. Interview with General Counsel #2, *supra* note 157, at 20.

fect.[203] Reg FD was passed to prevent issuers from selectively disclosing material information to analysts, brokers, or journalists, even for a legitimate corporate purpose, because these select individuals could potentially gain a trading benefit.[204] Thus, Reg FD requires an issuer to simultaneously or promptly disclose material information to the public that an issuer purposefully or inadvertently discloses to anyone regarding that issuer or its securities.[205] Similarly, although Reg FD requires more disclosure, those disclosures do not necessarily provide more meaningful, accurate information to the public.[206] Empirical studies show that estimates by analysts are actually less accurate since Reg FD was passed.[207] Analysts that once relied on early access to non-public information to project earning expectations now do not have that information and, as a result, are "less certain [their] earnings estimates will match the profit" that they report.[208] Ironically, a more restrictive privilege rule may not achieve its intended benefit of more disclosure.[209]

Another consideration is the risk that attorneys will be even more hesitant than they already are to put anything into writing when it involves third-party consultants.[210] As a law firm partner interviewee explained, lawyers currently:

> worry about documents because they last forever and can be taken out of context.[211] Lawyers are more conservative perhaps than they would be if they are giving oral advice. [Written advice] can be discovered so that if you are actually making the arguments in both directions you don't want the judge to read the downside of the argument.[212]

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203. *See supra* note 54.

204. *See* Barr, *supra* note 54.

205. *See* Securities Exchange Act, 17 C.F.R. § 243.100 (2009).

206. *See* Barr, *supra* note 54 (explaining that Reg FD has increased the amount of information flowing to the public from corporations but that the market is not necessarily better informed).

207. *See, e.g.*, Anup Agrawal et al., *Who is Afraid of Reg FD? The Behavior and Performance of Sell-Side Analysts Following the SEC's Fair Disclosure Rules*, 79 J. BUS. 2811, 2816-26 (2006).

208. Jeff D. Opdyke, *The Big Chill: Street Feels Effect of the New Fair Disclosure Rule*, WALL ST. J., Oct. 23, 2000, at C1.

209. Indeed, Reg FD may exacerbate this if the narrow rule is the adopted rule. One general counsel interviewee stated he worries he could "inadvertently get [him]self into a Reg FD situation" if he knew that conversations with external PR consultants could not be privileged except under a translator analogy. Interview with General Counsel #2, *supra* note 157, at 9-10.

210. Liability often turns on what is provable, not on substance. The lawyers may have made the same recommendations and the company the same decisions, but a memo that, for example, advises the client against sanctionable action, can ruin a case. *But see* Brown, *supra* note 63, at 942 (arguing in the context of compelled waiver that "[a] lawyer's ethical duty of competency combined with a fear of malpractice liability or the possibility that some other civil or criminal action will be instituted against him or her seem to provide ample motivation for careful documentation and record-keeping").

211. Interview with Law Firm Partner #55, *supra* note 33, at 6; *see also id.* at 7 ("urg[ing] clients generally" to "take their advice orally rather than in writing").

212. *Id.* at 7.

This worry would only increase if the narrow rule was the only rule. "If you knew that every time you put something in writing, you faced a real risk that that communication . . . is not going to be considered privileged by the court, [it would] impact the way you wrote . . . . Anybody that tells you anything to the contrary, isn't being honest."[213] A general counsel interviewee of a large investment bank said sarcastically, "Memory always serves you better than writing."[214] Given that depositions, even in good faith, do not yield accurate, complete information, discovery is impaired by the failure to keep an accurate record.[215]

A less restrictive rule might make lawyers more comfortable keeping a record of conversations. As one law firm partner interviewee remarked:

> [lawyers] may be more comfortable . . . [and] clients will get better legal advice. It will facilitate your communication if you know that what you were saying or what you were writing is going to be protected so that you [don't] have to be constructing even more protections to make sure that you've done what's necessary to try and maximize the privilege.[216]

Further, uninhibited consultation between attorneys and third-party specialists might help corporations craft disclosures in compliance with Reg FD that are less risky but more forthcoming. Similarly, a better understanding of the tax implications of a transaction gained from an investment banking consultant may enable the lawyers to persuade their corporate clients to provide more detailed disclosures to stockholders. If there is value in the public exchange of information, as the Supreme Court has intimated in cases addressing the First Amendment,[217] a narrow rule may not suffice.

4. May Not Increase Compliance

Lastly, although such a narrow standard may deter corporate misconduct, lack of third-party consultation may lead to less compliance and to less socially desirable decisions. [218] For example, when lawyers consult

213. Interview with Law Firm Partner #59, *supra* note, at 43. *See also* Interview with General Counsel #1, at 5 (Feb. 7, 2008) (on file with author) ("It's not like you will have a lot of written things that you are sharing if you thought you would lose privilege.").

214. Interview with General Counsel #1, *supra* note 213, at 5.

215. Interview with Law Firm Partner #55, *supra* note 33, at 6 ("[W]ith respect to what's orally said in the meeting, I also don't worry about it frankly too much because you have [an] endless number of meetings, and if you were called to testify as to what happened in the meetings no one will remember terribly well what happened three months ago.").

216. Interview with Law Firm Partner #59, *supra* note 43, at 24.

217. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-62 (1980) (referring to "the societal interest in the fullest possible dissemination of information" and explaining in the context of commercial speech that "[e]ven when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all").

218. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 390-94 (1981) (emphasizing that a narrow interpretation of the attorney–client privilege "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law"). Proponents of the corporate attorney–client privilege often assert that it helps the flow of

openly with PR executives, they better understand the reputational ramifications. This may help the lawyer persuade the CEO against taking a certain legally risky action. If a large clothing company is considering contracting with a manufacturing plant that borders on being a sweatshop, after consultation with a PR executive, a lawyer may be able to persuade the CEO not to contract with the company or to do so in a manner that protects the company from risk of liability and provides a better media platform at the same time. [219] In fact, lawyers often couch legal advice in terms of business consequences.[220] Additionally, as a few general counsel interviewees pointed out, consultation with a PR specialist may help the attorney determine what a corporation should disclose because a PR expert may better understand what the public would think was material. [221]

Similar benefits may stem from consultation with other types of third-party consultants. For example, consultation with the investment bankers

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information between attorney and client and thus compliance with the law. Alexander, *supra* note 14, at 222. Opponents to the corporate attorney–client privilege often use cases like Enron and World Bank to emphasize how the attorney-client privilege enables corporations to finagle regulations and avoid compliance.

219. One PR interviewee made this same point. He said that often lawyers will make the argument that a particular transaction or course of action should be pursued because it is legally appropriate, but that he will explain that the company will get highlighted publicly in a way that is significantly disadvantageous and that this would convince senior management to forgo the action. Interview with Global Head of Corporate Communications Investment Bank #47, at 5 (Apr. 3, 2008) (on file with author). For example, in the South it is perfectly legal to engage in mountain top removal to mine coal even though it is environmentally destructive. After talking with a PR executive, an attorney might successfully argue against the company's involvement from a reputational standpoint.

220. *In re* County of Erie, 473 F.3d 413, 420 (2d Cir. 2007) (explaining that the "complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining" implementation, alternative measures, and "collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances"); Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 478 (2008) (explaining that the general counsels in her study "deployed a variety of techniques, including invoking reputational and ethical considerations to persuade their peers [or] proposing different, less risky ways to structure transactions"); *see also supra* Part I.

221. Interview with Associate General Counsel #22, *supra* note 36, at 6; *see also* Interview with General Counsel #35, at 17 (Jan. 11, 2008) (on file with author) ("I think you have to divulge some confidential information to the PR folks so they can understand what it is. . . . There are certain times when [our company] was a public company, [and] if we had a potential crisis[,] aside from whether we wanted to talk about a PR disclosure, we may have [had] other legal disclosure obligations as part of the SEC or part of the other regulatory environment. . . . So that may force us to take a public position on something, but you can't really get to that determination without having a fully staffed team that has PR individuals on there to collectively determine that as a group."). *See also supra* note 36.

This is not to imply that PR executives control the legal decisions, but they do have influence. Interview with Counsel, PR/Law Firm #46, at 15 (Sept. 26, 2007) (on file with author). As a PR interviewee explained, "I mean I cannot say that somebody has ever written me a letter and said, 'Okay because of what you said we are not going to do this,' but there have been discussions about both legal and public relations difficulties that could arise from a particular activity of the client and they decide to change or even not to do it." *Id.* Also, although it was not true for most of the interviewees, some claimed that their companies have very experienced, seasoned *internal* PR executives that the lawyers consult with in lieu of external PR consultants. Beardslee, *Advocacy Part I*, *supra* note 6, at 22-34.

handling a company's upcoming merger could help the attorney decide what information should be disclosed to the other corporation. Similarly, an attorney may be better able to assess and convince the client of the risks of a possible restructuring by talking openly with a tax consultant.[222] Or an attorney may be better able to investigate whether the corporation is complying with the law and to recommend how to comply in the future with the help of a third-party consultant or investigator, like the one in *AIB*. [223] By consulting with these external specialists, a lawyer is better able to (a) provide the 360-degree counseling clients need and (b) play the gatekeeper role.[224] Additionally, when external consultants are part of the internal multidisciplinary team handling the project, they may be an indispensable source of risk information, because part of their role is to help manage and predict risks that internal employees and consultants might overlook.[225]

B. The Broad Agency Approach Is Too Broad

Although the broad agency approach enables informed decision-making in a way that the narrow approach does not, it too is less than ideal.

1. Not in Keeping with the Spirit of the Doctrine

a. Inconsistent with Attorney–Client Privilege Doctrine

A broad standard is not in keeping with the maxim that the attorney–client privilege should be construed narrowly because it impedes dis-

222. Not all large corporations have in-house tax specialists.

223. *See supra* notes 136-142 and accompanying text. The Supreme Court made a similar point when justifying application of the privilege to lower level corporate employees. Absent the protection of the privilege, "the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken." Upjohn Co. v. United States, 449 U.S. 383, 393 n.2 (1981).

224. Arguably, an attorney is better able to provide the moral counseling or gatekeeping functions often sought by clients when he or she is able to analyze the nonlegal aspects of the problem. Gantt, *supra* note 59, at 383 ("Significant anecdotal evidence supports the notion that many clients appreciate it when their attorneys offer moral counseling."); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1, 25 (1988); Burman, *supra* note 125 at 40 (arguing that clients want lawyers to provide more than just the legal aspects); *see also* Beardslee, *Advocacy in the Court of Public Opinion Part II: How Far Should Corporate Lawyers Go*, Geo. J. Legal Ethics (forthcoming 2009) (manuscript at 59, on file with author) (arguing that corporate clients want and need attorneys to play a gatekeeper role but admitting that this notion is contested) [hereinafter Beardslee, *Advocacy Part II*]; Rostain, *supra* note 220, at 474 (explaining that despite research findings suggesting otherwise "[s]everal general counsels [in the study] saw themselves as having an expansive gatekeeping role, which involved invoking reputational and other concerns in corporate decision making."); Beardslee, *Multidisciplinary Partnerships*, *supra* note 30, at 34-35 ("General Counsel view themselves as the 'ethics conscience of the corporation.'" (quoting a general counsel interviewee from a different study than the PR Study)). For a larger discussion of the ability of an attorney to play a gatekeeping role, see Sung Hui Kim, *Gatekeepers Inside Out*, 21 Geo. J. Legal Ethics 411, 429 (2007); Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 Fordham L. Rev. 983, 986 (2005).

225. Rosen, *supra* note 28, at 655 (explaining that project teams can lose their objectivity, so "companies rely on outside experts to manage this risk"); *see infra* notes 262-263 and accompanying text.

covery.[226] As such, the broad construction of *Kovel* risks not only the search for truth but also the viability of the corporate attorney–client privilege in general. Increased abuses prompt reconsideration of the arguments against applying the attorney–client privilege in the corporate context. [227] Cases where a court views the attorney's involvement in meetings with external consultants as merely a facade to achieve secrecy erode the defensibility of the privilege.[228] Risks to corporate attorney–client privilege protection may exist even if attorneys do not *actually* abuse the privilege because the broad standard in and of itself represents the threat of abuse. Faced with the appearance or the potential of impropriety, judges may simply deny coverage.

Additionally, courts applying the broad approach are not always careful to limit protection to communications that are based on or that might reveal client confidences.[229] As a result, they protect all communications between the attorney and the consultant if in furtherance of legal advice. For example, in *In re Grand Jury Dated March 23, 2003* (the Martha Stewart Case), the court carefully explained how the consultation with the external PR consultants facilitated the provision of legal advice and that non-public facts were disclosed.[230] However, it shielded *all* communications between the lawyers and the PR consultants that were not distributed beyond a "need to know" [231] basis—as opposed to shielding only those confidential communications that were based on or which might

226. Haugh v. Schroder Inv. Mgmt., No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *7 (S.D.N.Y. Apr. 25, 2003); Gertsberg, *supra* note 12, at 1455-56; Linas, *supra* note 13, at 421; Murphy, *supra* note 12, at 590-91.

227. Gertsberg, *supra* note 12, at 1456 ("While a crime/fraud exception exists to pierce the attorney–client privilege, the fact that the privilege was used for illegal purposes reinforces the idea shared by an increasing number of legal professionals, including those in the Department of Justice and the SEC, that the attorney–client privilege should be limited."); Paul R. Rice, *How the Tobacco Industry Lost Its Attorney–Client Privilege*, LEGAL TIMES, May 4, 1998, http://www.acprivilege.com/articles/article4.html.

228. NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 140 (N.D.N.Y. 2007) (analogizing the use of an external lawyer to that of a "mule—with the anticipated effect of concealing all conversations and all actions under the cloak of an attorney–client privilege or work product, without any particular professional involvement on [the attorney's] part").

229. *See, e.g.*, H.W. Carter & Sons, Inc. v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *6-7 (S.D.N.Y. May 16, 1995) (privileging all communications between a PR consultant, attorney, and client in a discovery suit related to trademark litigation and sale of branded watch); GoldenTrade v. Lee Apparel Co., 143 F.R.D. 514, 518-19 (S.D.N.Y. 1992). *See supra* notes 68-69 and accompanying text. *But see In re* E.I. du Pont de Nemours & Co., 918 F. Supp. 1524, 1547-48 (M.D. Ga. 1995) (denying protection to scientific studies produced by external consultants because they were not based on client confidences but factual scientific evidence gathered through observation of other data); U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (same).

230. *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed To (A) Grand Jury Witness Firm And (B) Grand Jury Witness, 265 F. Supp. 2d 321, 330-31 (S.D.N.Y. 2003); *see also H.W. Carter & Sons*, 1995 U.S. Dist. LEXIS 6578, at *7-8 (emphasizing the confidentiality of conversation between the client, lawyer, and PR consultants instead of analyzing whether specific communications contained confidential information).

231. *See supra* note 66 and accompanying text.

have disclosed client confidences.[232] Thus, it is not clear that courts applying a broader standard would deny protection to the studies conducted by the external scientists in the drug-recall scenario, even though they were conducted for business purposes and were not based on client confidences.[233] Similarly, these same courts might protect both draft press releases in their entirety and all the notes taken by the PR executive in the drug-recall scenario even if parts do not disclose confidential client information or legal advice.

b. Inconsistent with Third-Party Attorney–Client Privilege Doctrine

The broadest interpretation of *Kovel* is also inconsistent with the spirit of the original *Kovel* decision; it sweeps in more than a careful reading of *Kovel* would permit. The passage that gave birth to the first third-party exception stressed that protection should be afforded in circumstances where it was *necessary* or *indispensable* for effective legal services.[234] Although the Second Circuit too narrowly interpreted "necessary" to equate to situations in which the attorney cannot understand what the client has already communicated,[235] other courts have too widely interpreted "necessary" to mean merely "helpful" or "facilitating."[236] The broad approach is like a presumption that the communication with the third-party consultant will be protected versus the original notion that the attorney–client privilege is an exception to the existing broad discovery regime[237] and that communication with third parties waives the privilege (or prevents it from attaching).[238]

2. *May Promote Informed Decision-Making and Compliance but Shield Information*

Arguably, a broad approach may promote informed decision making and increased compliance because attorneys can be fairly confident that communications with third-party consultants will be protected. Armed with the business consequences, an attorney may be better able to convince senior management not to take a legally risky action that might

232. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 331, 334. Perhaps the court was assuming that the normal parameters of the privilege apply. However, since the language it used included but revised the normal attorney–client privilege standard, this is unlikely.

233. This may be true even if the distribution went beyond a need to know. *See supra* note 15 and accompanying text describing tobacco companies' use of third parties to shelter otherwise discoverable communications.

234. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

235. *See id.*

236. *See, e.g.*, *In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1191 ("[C]ommunications between the client and his agent made for the purpose of facilitating the rendition of legal services would be covered by the privilege."); Black & Decker Corp. v. United States, 219 F.R.D. 87, 90 (D. Md. 2003) ("[I]f the accountant is needed to facilitate communication between the client and the attorneys, then the communications with the accountant are protected by the privilege.").

237. Rice, *supra* note 170, at 742.

238. As discussed below, the harm from this standard is not merely derivative; therefore, a rigorous application of the other factors is not the solution.

technically comport with law. However, the words "useful," "helpful," or "facilitating" encompass too much and create a large zone of secrecy. For example, in one case, the court simply cited *Kovel* and stated that confidentiality was not waived by the presence of the third-party consultants during the client–lawyer meeting because the consultants participated in the meeting to help the lawyer render legal advice about how the client should react to the litigation.[239] If such a court were dealing with the drug-recall scenario, it might shield all communications with the external PR agent and all the documents the PR agent created. However, the document that recommends the best media response should not be protected. Although "useful," it was arguably not necessary to provide legal advice (and was likely motivated more by reputational than legal concerns). Similarly, protecting all the communications during the meeting is over-inclusive.

3. *May Enable Corporate Misconduct*

It is easier to hide abuse and is harder to uncover it when the standard is very broad.[240] Therefore, to a degree, a broad approach encourages corporate misconduct. This is because when corporate actors believe that there is little chance of discovery, they are more apt to misbehave.[241] Moreover, a broad approach may signal to attorneys that an aggressive approach to the privilege is acceptable and, therefore, should be pursued to further clients' interests.[242]

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239. H.W. Carter & Sons, Inc. v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995).

240. *See generally* Rice, *supra* note 170. This is likely why so many courts adhere to the narrow standard.

241. *Cf.* Baum, *supra* note 15, at 67 ("If . . . litigation opponents can be denied access to damning information due to the existence of the attorney–client privilege, the corporation might choose to pursue sanctionable actions."); *id.* at 69 (explaining that "sanctionable actions are privately desirable by corporations, [when] they produce a higher expected profit, yet they are socially harmful").

242. Think of it in terms of a budget. If your budget is unlimited, you buy different things than if the budget is capped. Susan Koniak made a similar point in her testimony before the United States Senate Committee on the Judiciary on the fall of Enron. She argued that the broadness of the securities laws "invited" lawyers to "fail[ ] to 'know' what the facts in front of the lawyer plainly suggest—that the client is committing fraud." *Accountability Issues: Lessons Learned From Enron's Fall: Hearing Before the S. Comm. On the Judiciary*, 107th Cong. 45-46 (2002) (testimony of Susan P. Koniak, Professor of Law, Boston University School of Law), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=149&wit_id=135 (recommending, *inter alia*, that Congress revise the securities laws to "replace the 'knowingly' standard . . . and provide that recklessness will suffice in actions brought by the SEC and by private parties as well"). Similarly, court decisions applying a broad approach to communications between attorneys and third-party consultants may have supported the tobacco attorneys' aggressive assertion of privilege protection for external studies and communications with outside researchers. *Cf.* Green, *supra* note 15, at 416-17 (describing tobacco attorneys' aggressive reading of privilege and attempts to cover up information); *id.* at 422-24, 429 (arguing that the ABA's position that "'progressive advocacy' is important in 'modern business lawyering'" was "read by many to mean that corporate lawyers may adopt aggressive legal interpretations and exploit legal loopholes" and likely contributed to the attorneys' "aggressive reading" of the corporate attorney–client privilege (quoting Brief for the A.B.A. as Amicus Curiae Supporting Petitioner, O'Melveny & Meyers v. FDIC, 512 U.S. 79 (1994) (No. 93-489)).

Additionally, because it is hard to prove frivolous an argument that something merely facilitated legal advice, this standard, combined with the lack of definitive factors to make the business–law distinction, facilitates pre-trial gaming. Corporations often assert privilege for hundreds of documents without adequate support, which delays the process and influences negotiations.[243] Consequently, the party with the deeper pockets can win the war by papering the other party to death even if it might ultimately lose the battle over the privilege claims. Moreover, a broad interpretation, unlike a narrow one, makes false assertions of privilege less obvious and, therefore, more effective in dissuading opponents from challenges.[244]

C. The Functional Equivalents Test Is Also Too Broad

The functional equivalents test suffers from some of the same problems as the broad agency approach and is, therefore, also inadequate.

1. Not in Keeping with the Spirit of the Doctrine

Because PR consultants, such as those in the drug-recall scenario, can be deemed functional equivalents even though they are hired for a discrete project and remain at (and loyal to) their outside agencies, an opportunity for manipulation is created. As Professor Rosen points out, many corporations today act as though they have "porous borders" and adopt a team model of organization, creating teams around finite projects or crises.[245] They deploy outside consultants on these internal teams in a way that eliminates barriers between employees and non-employees.[246] Roles are fluid and team members openly share information and ideas.

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243. Corporations use privilege wars to their advantage when they can—sometimes to purposefully enable privileged documents to be read by the judge. Interview with Law Firm Partner #55, *supra* note 33, at 6-7 ("I once wrote a letter to a client giving legal advice on a matter in the midst of litigation believing that it was privileged but actually wanting the judge to read it . . . . We listed it on the privilege log and the judge had to read it in order to determine whether or not it was privileged. He found it was privileged and [it was] not produced, but in the meantime he read my arguments as to why I thought my client should win."). These types of shenanigans likely occur in cases involving third-party consultants as well. *See, e.g.*, FTC v. GlaxoSmithKline, 294 F.3d 141, 144 (D.C. Cir. 2002) (whittling thousands of documents to hundreds via court ordered negotiation process and finally seeking resolution for ninety-one at trial); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1068 (N.D. Cal. 2002) (reviewing one hundred eighty documents for attorney–client privilege); Amway Corp. v. Procter & Gamble Co., No. 1:98-CV-726, 2001 U.S. Dist. LEXIS 4561, at *6-7 (W.D. Mich. Apr. 3, 2001).

244. Baum, *supra* note 15, at 72 (observing that "corporations have an incentive to assert the privilege also when the assertion is false" because "it is costly for plaintiffs to challenge the assertion[s]" and "since the assertion might be true, a positive payoff for the plaintiff is not guaranteed").

245. Rosen, *supra* note 28, at 643-49 (analyzing organizational development in corporations and how law firms are re-organizing to serve company teams). Qualitative interviews from the PR Study also supported this. *See supra* notes 34-38 and accompanying text.

246. Rosen, *supra* note 28, at 649 ("The distinction between inside and outside blurs with outsiders being part of the decision-making team.").

[247] Thus, if courts continue to consider the standard practice, context, corporate climate, and average duration of similar projects and thereby deemphasize the "continuing position" requirement outlined in *Upjohn*, almost any outside consultant hired by one of these "boundary-less" corporations would qualify as a functional equivalent. For example, the third-party consultant that was hired to help the outside law firm conduct the internal investigation in *AIB* might meet a functional equivalents test. [248] Similarly, the external PR consultant brought in to deal with the drug-recall crisis, depending on interactions with the client, might be deemed a functional equivalent of the drug company's employees. As discussed, this has happened. [249]

It is a theoretical stretch, however, to apply the functional equivalents theory to the external PR consultant in the drug-recall scenario (and thereby protect most, if not all, the communications in the hypothetical), even though he or she will likely be consulting for many months on the matter.[250] The circumstances in which third-party consultants are deemed functional equivalents today are likely different than those imagined by the original creators of the functional equivalents theory.

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247. *Id.* at 650 ("[S]eeing the company [with] porous borders means recognizing that transactions with outsiders are not, and need not be, arms-length deals.").

248. *See supra* notes 138-41 and accompanying text. An ironic example is *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999). There, the client's internal tax counsel met with the investment banker to understand, communicate, and help finesse the potential legal and financial risks of the proposal. *Id.* at 138. Had the investment banker ultimately been the banker to oversee the actual transaction (as it usually happens), he would have held an important influential position and would have likely been the only person in possession of certain information about the transaction. *See id.*; Sexton, *supra* note 2, at 498 (describing a functional equivalent as holding "extremely sensitive . . . position[s] as financial adviser, reviewer, and agent"). Although only hired temporarily for a finite period of time, he would have been treated like other employees on the team, copied on memos, expected to participate in meetings, and thereby have information important to the lawyer in providing legal services. *See supra* notes 109-12 and accompanying text; *See generally* McCaugherty v. Siffermann, 132 F.R.D. 234, 235-39 (N.D. Cal. 1990) (applying similar reasoning to protect communications with liquidation consultants); Rosen, *supra* note 28, at 646-51. Like in *Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, No. 01-Civ-3016, 2002 WL 31556383, at *2 (S.D.N.Y. Nov. 15, 2002), a court may consider important that this transaction was a one-off. Therefore, he might have been considered a functional equivalent of the corporation's employees.

249. FTC v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002); *see also In re* Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 219-220 (S.D.N.Y. 2001) (protecting manufacturing and marketing documents shared with external public and government relations consultants because the third-party consultants were treated just like the other full time employees that were part of the litigation/legal strategy crisis team).

250. The drug-recall scenario is slightly different than that in *In re Copper*, where a Japanese commodities trading company temporarily hired an outside PR agency to deal with reputation issues related to litigation because it did not have experience dealing with Western media and the company executives struggled with English. *In re Copper*, 200 F.R.D. at 215. Because "[the company's] internal resources were insufficient to cover the task," and confidential communications between the companies "were made for the purpose of facilitating the rendition of legal service," the court held that the outside PR agency was a functional equivalent of the company. *Id.* at 219-20. Yet, even this case does not exemplify functional equivalency in its truest form because the PR company was not hired as an independent contractor for an ongoing position. *Id.* It was hired for a discrete crisis, and the company lacked sufficient resources to handle it. *Id.*

Outsourcing the sales force or the IT department for an indefinite period of time in order to save on health care costs is very different than hiring a third-party consultant to aid internal managers in running finite projects or in dealing with a specific crisis—especially when the company has dedicated internal staff to the matter.[251]

True, the team approach to organization cuts both ways. Functional equivalency is supposed to give protection to independent contractors that are treated like any other employees. In a company with porous borders, these temporary external consultants behave and are treated like other employees on the project team.[252] When the team is dissolved, work on the project ends for both internal and external team members. Why, then, should the functional equivalents doctrine not bend to changing times, to the new model of organization? [253] The answer is twofold: (a) third parties may potentially serve a gatekeeping function, and (b) as discussed below, this test shields information that would be discoverable under an agency theory.

2. *May Increase Informed Decision Making and Compliance but Decrease Discovery*

As with the broad approach, the functional equivalents exception enables communications with third-party consultants to be protected in many circumstances. Therefore, for the same reasons described above, this exception may enhance informed decision making and compliance. However, once the third-party consultant is deemed a functional equivalent, the analysis falls under *Upjohn*, which may afford even more expansive protection than that provided by the broadest *Kovel* theory.[254] This is because the functional equivalent "is" the *de facto* client and, therefore, *all* of the information and the advice that the functional equivalent shares with the lawyer is considered confidential client information. Moreover, when an "employee" communicates with an attorney, many courts presume that the communication is for legal advice and do not require a strong connection between the information provided and the employee's duties.[255]

Today, plaintiffs and the government find it very difficult to elicit information from corporate employees who are scared to talk—especially

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251. *Cf.* Rosen, *supra* note 28, at 647-48 (explaining that outsourcing includes not only contingency based hiring of non-employee workers to do basic organizational functions, but also professional service consultants for their investment in R&D, varied experience, and efficient, high quality work).

252. *Id.* at 649.

253. This question is salient since, in advocating a standard broader than the narrow approach, this Article is arguing (to a degree) that the third-party attorney–client privilege doctrine bends to changing times.

254. Hamilton, *supra* note 64, at 650 ("Upjohn left the door open for the corporate attorney–client privilege's possible application where there are only tenuous connections between the subject of the communication and the employee's work-related duties."). *See also supra* notes 63-67 and accompanying text.

255. *In re* Bieter Co., 16 F.3d 929, 938-39 (8th Cir. 1994). *See supra* note 254.

when corporate counsel is present, as is usually the case. Therefore, third parties are a valuable source of information. They know how the corporation is monitored and structured. Additionally, transparency—information about what third-party consultants and lawyers are doing—assists regulation.[256] Protecting these consultants to the same extent that employees are protected lends less transparency to the public. This, in turn, may reduce confidence in the economy, which has been prone to failure lately. The recent subprime mortgage scandals and the collapse of key investment banks are great examples.

Application of the functional equivalents test may enable corporations to use attorney involvement to circumvent discovery of sanctionable action.[257] For example, external scientists hired to be part of an internal drug R&D team could be deemed functional equivalents and all the studies reflecting health risks could be protected by the attorney–client privilege under *Upjohn* if they aided the lawyer in providing legal advice to the team (and were not distributed beyond a need-to-know). The company could then more freely ignore these results or fail to disclose them without fear of discovery. Therefore, in the drug-recall hypothetical, the clinical studies could be protected if a court determined their wide distribution was not beyond a "need to know" basis. Arguably, this could also occur if the scientists are internal employees, but should not the corporation shoulder the costs of staffing its needs in order to garner protection?[258] In short, because porous borders of corporations make temporary, external consultants functional equivalents of the corporation's employees, the functional equivalents test not only collapses with the broadest approach to *Kovel* but may prove even more expansive.

3. *May Not Deter Corporate Misconduct*

Moreover, external consultants, although appearing to behave and be treated just like the internal team members, may be separate in one key respect. External consultants have different interests than employees, and especially, upper management.[259] Although they have some of the

256. Although they disagree on the balance to be struck between transparency and a client's right to protect information, both Bruce A. Green and William H. Simon appear to agree that some level of transparency can facilitate professional regulation. Bruce A. Green, *The Market for Bad Legal Scholarship: William H. Simon's Experiment in Professional Regulation*, 60 STAN. L. REV. 1605, 1612 (2008) ("[T]here is a tension between the regulatory interest in transparency and client confidentiality, which promotes the private and public interest in obtaining effective legal assistance."); William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1561 (2008) ("Secrecy removes another mechanism of lawyer accountability.").

257. *See supra* notes 241-42 and accompanying text.

258. Also, one could argue that this could result in less use of consultants, which may have negative consequences as argued earlier, but if the consultation is necessary and the corporation wants to better protect itself, it can hire the consultant as an employee.

259. Those in opposition to the corporate attorney–client privilege often make a similar argument with respect to employees. *See, e.g.*, Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney–Client Privilege*, 69 NOTRE DAME L. REV. 157, 173-74 (1993) (suggesting that corporate employees and clients have different interests

same objectives, they do not necessarily have a commonality of interests. They are part of a different organization that has its own corporate culture.[260] These differences can potentially have both negative and positive consequences. On one hand, the variance in interest and culture between the external consultant and the client could influence team members to behave in a way that does not comport with the norms and ethics of the corporate client. [261] On the other hand, these differences could serve a very useful function. Outside consultants may not fall prey to the same subjectivity as the "real" internal team members. [262] Thus, as Professor Rosen points out, they may be able to protect against the risk that the team will lose objectivity because of its propinquity to the project. [263] A rule that shields communications with external consultants if they are treated like employees encourages clients to treat them like employees, which may eventually erode the ability of the external consultant to serve this function. Thus, functional equivalency may inculcate inapposite norms into the corporate culture or prevent gatekeeping.

D. The Doctrine is Unpredictable and Subject to Abuse

For the reasons discussed, this Article argues that each of the current individual approaches is inadequate. As it stands today, however, courts can use any of the approaches to determine whether communications with third-party consultants will be privileged. This creates additional problems.

1. Covertly Unpredictable

In addition to being substantively off-balance, the third-party attorney–client privilege doctrine is unpredictable and results in varying interpretation and application. Courts within the same district have applied different interpretations of the agency exception,[264] and protection can

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and, therefore, that employee candor is limited because the privilege only protects the corporation). *But see* Glynn, *supra* note 14, at 78 ("[I]n many circumstances the entity, its decision makers, and its employees will have mutual interests."). If employees sometimes do not have mutual interests with the corporate entity and the decision makers, arguably this might be true for workers that are external to the corporation.

260. Tamar Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 Bus. Law. 161, 161-64 (2006) (arguing that corporations have a culture that is a "social habit" and that the expected form and substance of interaction amounts to the "culture" of the corporation).

261. Depending on the existing culture of the corporate client, this could be a positive or a negative impact. *But see* Joan MacLeod Heminway, *Does Sarbanes-Oxley Foster the Existence of Ethical Executive Role Models in the Corporation?*, 3 J. of Bus. & Tech. L. 221, 223 (2008) (contending that "[c]reating or changing the ethical components of culture in a corporation is exceedingly difficult").

262. This is their claimed virtue, although more research needs to be done to confirm it.

263. Rosen, *supra* note 28, at 655. *See supra* note 225.

264. *See, e.g.*, Allied Irish Banks v. Bank of Am., 240 F.R.D. 96, 101, 104-05 (S.D.N.Y. 2007) (adhering to the narrow approach of *Kovel*); *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed To (A) Grand Jury Witness Firm And (B) Grand Jury Witness, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (applying a more moderate approach of *Kovel*);

hinge on which exception theory is applied by the court.[265] Indeed, communications with third-party consultants that would be denied protection under a narrow agency theory can prevail under a functional equivalents test.[266] Therefore, protection of third-party communication can turn not only on which interpretation of *Kovel* is used, but also on the choice between agency and functional equivalents theories. A recent case between Labatt and Molson Breweries highlights this point.[267] Labatt's attorney met with Labatt's PR and advertising agencies to ensure "that the content of the advertising placed by the agencies would not undercut the theories expounded in the [related] litigation."[268] Applying a narrow agency theory, [269] the majority upheld the lower court's ruling that the handwritten notes taken by the external PR consultant during the meeting were discoverable even though they revealed litigation strategy. [270] The dissent, however, analyzed the case under the functional equivalents theory; and it concluded that the consultants were functional equivalents of Labatt employees and that the attorney met with them "for the purpose of assuring that the agents take legally correct actions on the client's behalf." [271] Thus, the decision can turn on which theory is applied.[272]

Moreover, there is little guidance on which factors will be considered when applying either exception. Even those courts that claim to apply more stringent tests than the broadest application of *Kovel* do not isolate key factors to guide future courts or litigants.[273] As a result, attorneys do not know *ex ante* how the privilege will be applied. For example, over fifty percent of general counsel respondents in the PR Study hired external PR consultants to manage a legal controversy in the last three years; yet the findings suggest that they are uncertain about what types of infor-

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H.W. Carter & Sons, Inc. v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995) (applying a broad approach of *Kovel*).

265. *See, e.g.*, Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc., 707 F. Supp. 1429, 1445-46 (D. Del. 1989) (explaining that the difference between a patent agent acting as a client's constructive employee as opposed to an agent of the attorney is important and determinative although formalistic).

266. *See id.* at 1445.

267. Dorf & Stanton Commc'ns, Inc. v. Molson Breweries, 100 F.3d 919 (Fed. Cir. 1996).

268. John Labatt Ltd. v. Molson Breweries, No. M885, 1995 U.S. Dist. LEXIS 507, at *3-4 (S.D.N.Y. Jan. 19, 1995), *enforced sub. nom.* Dorf & Stanton Commc'ns, Inc. v. Molson Breweries, 100 F.3d 919 (Fed. Cir. 1996).

269. Although it is not completely clear from the opinion, it appears that the lower court based its decision, in part, on a narrow interpretation of *Kovel*. *See Labatt*, 1995 U.S. Dist. LEXIS 507, at *4 ("The documents themselves do not indicate either the seeking of legal advice or the confidentiality of their contents."); *see also Dorf & Stanton Commc'ns, Inc.*, 100 F.3d at 927-28 (Newman, J., dissenting).

270. *Dorf & Stanton Commc'ns, Inc.*, 100 F.3d at 923-24 (majority opinion).

271. *Id.* at 928 (Newman, J., dissenting). *Cf.* Murphy, *supra* note 12, at 572 (explaining that the dissent "analyzed the case under a completely different theory").

272. This is not a lone case. As mentioned above, court majorities have deemed external consultants functional equivalents of the corporate client. *See supra* notes 109-16 and accompanying text.

273. *See, e.g.*, United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972); *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed To (A) Grand Jury Witness Firm And (B) Grand Jury Witness, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003).

mation sharing might endanger the attorney–client privilege.[274] In keeping with those findings, it did not appear that the interviewees in the PR Study fully comprehended the real state of the doctrine or, understandably, when communications with external PR consultants would be covered by the attorney–client privilege.[275] As mentioned before, attorneys believe that it is important to share information with the external consultant to provide the best legal advice, which puts the attorneys in an unwieldy position.[276] Unsurprisingly, forty-seven percent of survey respondents said they were uncomfortable sharing any confidential information with external PR consultants. Thus, those attorneys that believe that the narrow rule is "the" rule today are likely neither utilizing the external consultants to their fullest potential nor providing the most informed legal advice to their corporate clients.[277] Alternatively, some attorneys may take advantage of the lack of clarity of the doctrine and pursue false privilege claims, understanding that the costs associated with challenging the assertion are high and the opponent has no dependable way to predict a ruling.[278]

True, doctrine is often unpredictable and unworkable. However, here it is covertly so. Scholars and courts often present the third-party attorney–client privilege doctrine as if it were clear and there were only one standard.[279] Although the interviewees seemed to be aware that protec-

274. *See supra* notes 34-38 and accompanying text.

275. Some of the interviewees mentioned the agency theory and the recent Martha Stewart case in which the court protected communications between the attorney and the external PR consultant. *See In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 326. Some of the attorney interviewees seemed to be aware that courts do not always side in favor of protection. But none mentioned the functional equivalents theory as a mode for protecting communications with external PR consultants. Indeed, when they talked about the attorney–client privilege, the lawyer interviewees rarely justified arguments for privilege protection in specific doctrinal terms. Instead, they described tactics they employed that were based on a vague notion they had about what was required for protection and often this notion was inaccurate. For example, one lawyer interviewee declared that the attorney–client privilege would apply to communications with external PR consultants if there was "baseline agreement of confidentiality and they become agents." Interview with General Counsel #31, *supra* note 31, at 17. Another explained, "if [the external PR executives] are part of [the lawyer's] team as opposed to part of the client's team, you have more potential that it's [protected] . . . . It's more that it's part of the legal strategy as opposed to the business strategy." Interview with Law Firm Partner #460, *supra* note 60, at 13; *see also infra* notes 280, 282. These findings are supported by the literature. Glynn, *supra* note 14, at 82 ("[O]ne of the consistent findings in the aforementioned surveys is how little corporate executives, other laypeople, and attorneys understand the scope and, more importantly, limitations of the privilege.").

276. *See supra* notes 59-60 and accompanying text.

277. The few interviewees that appeared to believe that communications would not be protected were "very careful not to accidentally waive privilege by, for example, having a[n] [external] PR person in on a meeting where confidential information is discussed." *See, e.g.*, Interview with General Counsel #38 (Nov. 1, 2008) (on file with author).

278. Baum, *supra* note 15, at 72-73 (arguing in the context of the attorney–client privilege in general that corporations "have an incentive to assert the privilege . . . when the assertion is false" because "it is costly for plaintiffs to challenge the assertion" and "since the assertion may be true, a positive pay-off . . . is not guaranteed").

279. Many scholars and courts do not outwardly recognize that there is more than one standard applicable to third-party consultation or more than one approach to the agency exception or that application of the third-party doctrine is complex. *See, e.g.*, *In re Grand*

tion "can be a challenge" when confidential information is shared with external PR consultants, the majority of interviewees believed they had a "good argument" that communications with external consultants are privileged.[280] In keeping with that, fifty-three percent of general counsel respondents to the S&P 500 survey in the PR Study appeared to believe that attorney–client privilege law was clear and would protect communications with external PR consultants.[281] This is perhaps even more disconcerting than the number of general counsels who remain uncertain

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Jury Subpoenas, 265 F. Supp. 2d at 326; Baum, *supra* note 15, at 64 n.6 (claiming that courts have "done away" with protection of communications with third-party consultants "by holding that lawyer communications . . . will only be privileged when the professional acts as an 'interpreter' for the lawyer"); Corcoran, *supra* note 44, at 725 (explaining only the broadest interpretation); Hantler et al., *supra* note 10, at 25, 29 (claiming attorney–client privilege protects communications with non-testifying experts that assist attorneys in provision of legal services and failing to identify the varying ways courts apply the doctrine); Linas, *supra* note 13, at 407 (claiming that attorney–client privilege, as it relates to accountants, patent agents, and non-testifying experts "is well-established and poses few problems for attorneys who wish to ensure that their communications with clients will be privileged"); Murphy, *supra* note 12, at 570 (explaining only the narrow interpretation and the functional equivalents theory); *see* Joseph W. Martini & Charles F. Willson, *Defending Your Client in the Court of Public Opinion*, 28 CHAMPION 20, 21 (2004); *see also* United States v. Alvarez, 519 F.2d 1036, 1045-46 (3d Cir. 1975); *In re* Tri-State Outdoor Media Group, Inc., 283 B.R. 358, 363 (Bankr. M.D. Ga. 2002); *cf.* Davis & Beisecker, *supra* note 10, at 594 (recognizing that "categorization of others as agents for the lawyer has been less clear" but explaining that "[c]ommunications with accountants, administrative practitioners and patent agents have all been protected by the attorney-client privilege where . . . [their] purpose was to assist the lawyer in rendering legal services to the client"); Jones, *supra* note 51, at 423-33 (recognizing that determining whether the privilege applies to an agent is "difficult" under *Kovel* but failing to identify the various ways courts have interpreted *Kovel*).

280. Interview with General Counsel #30, at 20 (July 10, 2008) (on file with author). *See also* Interview with General Counsel #31, *supra* note 31, at 17 (recognizing that it is not a one hundred percent guarantee, especially given the culture of waiver with the government, but believing that if there is a "baseline agreement of confidentiality," the external consultants are agents and communications would be protected by the privilege); Interview with General Counsel #29, at 31 (June 7, 2008) (on file with author) (understanding the issue but believing that communications with external consultants would likely be protected); Interview with General Counsel #27, at 18 (June 1, 2008) (on file with author) (explaining that it "is very hard to generalize but there are very specific strategies on how to preserve and protect the privilege, for example, having counsel, that may be outside counsel, in every discussion"). Two interviewees mentioned that Delaware courts and M&A lawyers recognize a "deal privilege" protecting communications with external consultants in M&A deals. Interview with Law Firm Partner #49, *supra* note 37, at 11; Interview with General Counsel #2, *supra* note 157, at 23. Although there exists something called "business strategy immunity," it is not clear that any "deal privilege" as described by the interviewees really exists. *See* Hexion Specialty Chems., Inc. v. Huntsman Corp., No. 3841-VCL, 2008 WL 3878339, at *4 (Del. Ch. Aug. 22, 2008) ("[B]usiness strategy immunity has been invoked by this court to prevent discovery 'where the information disclosed may not be used for proper legal purposes, but rather for practical business advantages.'" (quoting NiSource Capital Mkts., Inc. v. Columbia Energy Group, No. CIV. A. 17341, 1999 WL 959183, at *3 (Del. Ch. Sept. 24, 1999))). For example, in a recent case, a Delaware court held that communications between the corporation and its financial advisors during merger negotiations were not protected by the attorney–client privilege, the work–product doctrine, or the rule protecting facts or opinions of non-testifying experts. *See* Hexion Specialty Chemicals, Inc. v. Huntsman Corp., No. 3841-VCL, 2008 WL 3878339 (Del. Ch. Aug. 22, 2008); *see also supra* note 275.

281. This is consistent with the interviews. *See supra* note 275, sources cited *supra* note 280; *see also* Glynn, *supra* note 14, at 80-81 ("[S]ome of the misunderstandings in particular

how to safely handle communications with external PR consultants.[282] The problem is not simply that application of the privilege is uncertain. Instead, it is that attorneys cannot calculate the risks of exposure and many believe that the risks are lower than they currently are. As the Supreme Court stated in *Upjohn*, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[283]

2. *Allows Inconsistent and Inequitable Results*

In addition to "duplicative work" that wastes time and effort,[284] the doctrine's lack of predictability risks inconsistent and inequitable results. A judge in one court may deny protection to the same communication which a judge in another court deems privileged.[285] A system that applies different tests or provides different results for similar actions is not perceived as administering justice—one of the original justifications for the attorney–client privilege itself.[286] Although its elasticity enables judges to deny protection when they think attorneys are using it to create a zone of secrecy—arguably a good thing—the third-party doctrine enables judges to deny protection based on a bias against certain types of third parties.[287] For example, a judge that feels that PR matters should never be considered integral to the provision of legal services can easily deny protection to external PR consultants.[288] The doctrine's obscurity

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support the conclusion that executives, employees, and attorneys speak freely because they believe the communications will remain confidential.").

282. There is other evidence that attorneys are confused and uncertain. Posting of Beck/Herrmann, *The Privilege and Public Relations Firms*, DRUG AND DEVICE LAW, http://druganddevicelaw.blogspot.com/2007/05/privilege-and-public-relations-firms.html (May 11, 2007, 3:42 PM) (on file with author) (discussing the uncertainty around protection of communications with PR consultants and whether it is safer for the attorney or the client to hire the consultant); Glynn, *supra* note 194, at 80-83 (contending that the current attorney–client privilege doctrine is uncertain and that clients do not understand its scope).

283. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

284. *Cf.* Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 73 (1992) ("[A]dherence to precedent increases judicial efficiency by eliminating the duplicative work and the risk of error from incompetence or bias that would result from starting each case anew from first principles."); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 972 (1995) ("Rules can, in short, be the most efficient way to proceed, by saving time and effort, and by reducing the risk of error in particular cases.").

285. Haugh v. Schroder Inv. Mgmt., No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *8-9 (S.D.N.Y. Apr. 25, 2003) (denying protection to all communications between PR consultant, attorney, and client); H.W. Carter & Sons, Inc. v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995) (privileging all communications between PR consultant, attorney, and client).

286. Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (explaining that the privilege was devised "in the interest and *administration of justice*" (emphasis added)).

287. The current doctrine is vague and conflicting. As such, it enables judges to supplant their own substance and political preferences. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690 (1976); *cf.* Frederick Schauer, PLAYING BY THE RULES, 98 (1991) (discussing rules as "devices for the allocation of power").

288. Although hard to prove, in a few case opinions, the language indicates that the judge would *never* believe that communications with PR consultants could aid legal advice.

also confers special power to the government. A regulator can more easily "convince" a corporation to waive the privilege when failure to waive might result in more severe charges, and the corporation cannot accurately assess the likelihood of privilege protection absent waiver.[289]

IV. RECOMMENDATIONS

As discussed, the current doctrine that protects communications between lawyers, clients, and third-party consultants is unpredictable. Worse yet, the two approaches that have emerged are inadequate. The broad approach is too expansive, and the narrow approach is too constrictive. So, where should the line be drawn? Which communications with third-party consultants should be protected? There are some difficulties in answering this question. First, as discussed in Part II.C, there is the difficulty in determining when a communication is for legal as opposed to business advice. Second, answering this question requires (to a certain extent) bracketing the dispute about whether the attorney–client privilege should be applied to corporations.[290] Therefore, the central inquiry of this Article is: How capacious should the corporate attorney–client privilege be? As corporations' boundaries continue to expand, the use of outside consultants grows, and therefore the need for attorney consultation increases, should the attorney–client privilege follow suit?

As demonstrated by the analysis of the current approaches to the third-party privilege doctrine, there is a danger that the attorney–client privilege could become too capacious with respect to communications with third-party consultants. It could (as argued with respect to the broad approach) encourage corporate misconduct and provide a huge zone of secrecy in opposition to open discovery rules. However, if the attorney–client privilege is interpreted in this context too restrictedly (like the narrow approach), it may fail to provide its intended benefits, like informed decision making and increased compliance. Moreover, it is hard for the privilege to be valuable if attorneys cannot make any logical prediction *ex ante* about which communications will be privileged, or at

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See, e.g., Dorf & Stanton Commc'ns, Inc. v. Molson Breweries, 100 F.3d 919, 924-28 (Fed. Cir. 1996) (Newman, J., dissenting); John Labatt Ltd. v. Molson Breweries, No. M885, 1995 U.S. Dist. LEXIS 507, at *3-4 (S.D.N.Y. Jan. 19, 1995) (refusing to protect notes taken by external PR consultant during a meeting even though the notes contained details about the litigation strategy and legal advice), *enforced sub. nom* Doff & Stanton Commc'ns, Inc. v. Molson Breweries, 100 F.3d 919 (Fed. Cir. 1006). *See also* Calvin Klein Trademark Trust v. Wachner (*Calvin Klein I*), 198 F.R.D. 53, 55 (S.D.N.Y. 2000) ("It may be that the modern client comes to court as prepared to massage the media as to persuade the judge; but nothing in the client's communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status.").

289. *See supra* note 139 and accompanying text. This issue is not limited to the third party context but is exacerbated there because the privilege is already unpredictable in the corporate context. Sexton, *supra* note 2, at 471. Furthermore, large corporations can be hailed into almost any state or federal court or both. *Cf.* Hamilton, *supra* note 64, at 654 ("[I]nconsistent application throughout the nation makes structuring a company's affairs to conform to various privilege regimes a daunting task.").

290. *See supra* note 14. *But see supra* notes 169-171 and accompanying text.

least know by which standard the communications will be judged. The point is that whatever solution is developed should excel on the criteria identified in Part III—criteria that is often used to analyze whether a corporate attorney–client privilege should exist. That is, it should be designed to limit corporate misconduct and a zone of secrecy, but also to enable informed decision-making and compliance. Moreover, it should strive to be consistent with the spirit of the corporate attorney-client privilege and to provide some enhancement in predictability and clarity over that afforded by the current regime. Based on these first principles, the following sections provide a specific proposal for revising the third-party corporate attorney–client privilege doctrine and an analysis of the proposal.

A. Specific Proposal[291]

The attorney–client privilege is an exception to the general rule that relevant information should be discoverable.[292] It is a *privilege.* Therefore, as communications move farther away from the traditional, formal lawyer–client scenario, there should be more concern over the substance and purpose of the communication. Therefore, this Article recommends a standard that, on the one hand, permits more external consultation than does the narrow approach, but, on the other, constricts courts' ability to construe the privilege very broadly and alerts attorneys to confer with third-party consultants with care and deliberation.

1. One Uniform Standard

This Article proposes adopting one uniform standard, based on an agency theory, to analyze whether third-party consultation waives the attorney–client privilege. At first it may seem strange to excise the functional equivalents test, since it addresses how the third party works in relation to other employees, while the agency test addresses how the third party aids the attorney. However, as discussed, the differences between the two exceptions fade in application.[293] In practice, both theories place

291. Although these recommendations are intended for federal courts and third-party consultation in the corporate context, they could also be applied to states and the individual context. State attorney–client privilege law is obscure and suffers from similar problems to those discussed here. *Cf.* Hamilton, *supra* note 64, 633-40 (surveying state corporate attorney–client privilege after *Upjohn*). Moreover, should a federal court adopt the proposal in this Article, it may affect state courts because state courts consider how federal courts apply the corporate attorney–client privilege when making their own determinations. *Cf.* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. Rev. 959, 959-66 (arguing that persuasive federal court opinions, although not binding on state courts, "assert a form of 'persuasive federalism'" and explaining that the *Upjohn* "decision has been widely cited by state courts"). Indeed, state courts rely on *Kovel* and other federal court cases applying federal attorney-client privilege law to determine whether the privilege should apply to communications between attorneys and third-party consultants. *See, e.g.*, Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1198 (Mass. 2009).

292. *See* Rice, *supra* 170, at 742.

293. *See supra* Part II.B.3.

the emphasis on "why an attorney was consulted, rather than with whom the attorney communicated."[294] On closer examination, therefore, the agency theory provides a useful limiting principle to prevent the overbroad protection sometimes produced by the functional equivalents test. As explained above, the way that courts apply functional equivalency enables companies to cover third-party consultancy services with the expansive protection afforded by *Upjohn* simply because the corporation hired the third-party consultant instead of the attorney. This is easily avoided by applying one agency-based standard to consultation with any external professional specialist.[295] Thus, any third-party consultant that is a professional strategic consultant (for example, a PR consultant) would be analyzed under an agency theory—even if hired by the client on an ongoing basis. A uniform standard ensures that functional equivalency cannot increase the reach of the attorney–client privilege in this context and that decisions do not turn on who hired the consultant.

2. *A Nexus Test*

As discussed above, the broadest interpretation of *Kovel* threatens to protect all consultations between the lawyer and the third-party consultant, and the narrowest fails to protect almost any third-party consultation. This Article recommends requiring a strong nexus between the consultant's service and the legal advice or services ultimately provided to the client. As a few federal courts have mandated,[296] the proponent should be required to show how the communication with the third party was *necessary* or "*indispensable*"[297] to the lawyer in providing legal advice or services.[298] In other words, it would not be sufficient to demon-

294. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (making this point in supporting the subject matter test over the control test).

295. "Specialist" refers to a third-party consultant in the traditional sense. This recommendation does not impact people independently contracted to handle a corporation's internal IT department or sales force who are not strategic consultants. These types of quasi-employees would still be analyzed under the functional equivalents test.

296. *See supra* note 92.

297. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) (citing 8 WIGMORE ON EVIDENCE § 2301 (1928)). *Kovel* indicates that to sustain a privilege an accountant must be "necessary, or at least highly useful," for the effective consultation between the client and the lawyer. *Id.* at 922.

298. Federal courts have infused a standard similar to this one in their opinions. For example, in *Haugh*, the court required that proponents identify a "nexus between the consultant's work and the attorney's" advice or "role in preparing [the] complaint or case . . . for court." Haugh v. Schroder Inv. Mgmt., No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *8-9 (S.D.N.Y. Apr. 25, 2003). In *Cavallaro*, the First Circuit used language from *Kovel* and interpreted the case as requiring that the third party be "necessary, or at least highly useful, for the effective consultation between the client and the lawyer." Cavallaro v. United States, 284 F.3d 236, 240 (1st Cir. 2002) (quoting *Kovel*, 296 F.2d 918, 922 (2d Cir. 1961)). In *In re Grand Jury Subpoenas Dated March 24, 2003 Directed To (A) Grand Jury Witness Firm And (B) Grand Jury Witness*, the court denied protection to certain communications for failure to show "a nexus sufficiently close to the provision or receipt of legal advice." 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003). In *Attorney General of the United States v. Covington & Burlington*, the District Court of the District of Columbia applied a nexus test in reverse. 430 F. Supp. 1117, 1121 (D.D.C. 1977). It denied protection because the firm's activities were "only tangentially related" to the legal matters. *Id.* Here, communi-

strate that the consultation simply helped the attorney, but instead that it was *essential* to doing something related to being a lawyer, like fine-tuning a legal strategy, ensuring compliance, avoiding liability, protecting a legal defense, administering an estate, or litigating an antitrust issue, etc.[299] If the communication was necessary for the attorney's provision of legal advice and services and the proponent can identify a strong nexus between the consultancy and the attorney's role, then it should be protected.[300] If the communication merely helped the company to design a PR campaign, protection should not be afforded.[301] On the other hand, if the communication helped ensure that the PR campaign did not create legal liability, induce prosecutors to bring charges, or weaken trial defenses, and it was the only way to accomplish these goals, then it should be protected because there is a strong nexus between the consultation and the legal advice provided. What is necessary would be proof that the consultation—whatever type it was—served this purpose.[302]

To that end, under the rubric recommended in this Article, it does not make sense to consider—as scholars and courts have—the *type* of service or advice the *third-party* consultant provides or if they are typical or atyp-

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cation is protected if the consultant's services have a nexus to or are substantially related to the lawyer's advice. Some scholars have also analyzed application of *Kovel* under a similar necessity test. *See, e.g.*, Gertsberg, *supra* note 12, at 1446; Gruetzmacher, *supra* note 12, at 980 (asking whether attorneys *need* to communicate with accountants when handling complex financial transactions in order to facilitate provision of legal services); Richmond, *supra* note 12, at 399 (explaining that courts "confine [the attorney–client privilege in this context] to its narrowest possible limits" and that under current doctrine, in order to be protected, there must be "a clear nexus between the public relations consultant's work and the attorney's role in representing the client"); Epstein *supra* note 28 at 217 (describing the *Kovel* doctrine as protecting communications with third parties "where the communication with the other professional . . . is deemed necessary to assist the attorney better to understand the facts and give a legal opinion to the client"); *see also supra* note 92.

299. Sexton, *supra* note 2, at 490 (1982) (identifying these actions as legal services). Professor Sexton explains that, although some courts interpret the privilege to only extend to legal advice, the privilege should and does cover legal services—that is "any action by the attorney requiring peculiarly legal skills." *Id.* at 491. Defining what are "legal services," however, is an arduous task and is not static. We are a "nimble profession." *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 391-411, 439-66, 606-54 (2d ed. 1985). Lawyers have risen to the changing marketplace and redefined what comprises legal services many times over. Daly, *supra* note 49, at 282 (discussing the profession's ability to change); Robert L. Nelson & David M. Trubek, *Introduction* to LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL SYSTEM 1 (Robert L. Nelson et al. eds., 1992); Sisk & Abbate, *supra* note 45, at 7 ("Professional services, regarded as non-legal only a few decades ago may be essential elements of effective legal representation today.").

300. Some courts have attempted to apply a similar test. *See, e.g.*, *Haugh*, 2003 U.S. Dist. LEXIS 14586, at *8-9 (applying a similar test). *See also supra* note 298. The proposed test is not dissimilar to "substantially related" test like that in the intermediate scrutiny test in constitutional law or that in Rule 1.9. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2002).

301. *See, e.g.*, *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 326; *Haugh*, 2003 U.S. Dist. LEXIS 14586, at *7; Calvin Klein Trademark Trust v. Wachner (*Calvin Klein I*), 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

302. *See Haugh*, 2003 U.S. Dist. LEXIS 14586, at *7; *Calvin Klein I*, 198 F.R.D. at 54-55.

ical.[303] When an attorney consults with an accountant about a restructuring, the fact that the accountant provided typical service or non-legal advice is irrelevant. The point of the doctrine is to allow the attorney to take into account non-legal considerations when forming legal opinions.[304] Further, that attorneys alone could not have handled the matter should not prevent establishment of a nexus.[305] The agency exception was devised *because* attorneys sometimes need the help of others to provide competent legal advice.

To be clear, this Article is not advocating absolute protection of *all* communications between the attorney and the third-party consultants that are necessary for the provision of legal advice. Third-party consultants assist lawyers by helping them anticipate the business consequences of their legal decisions. However, this recommendation does not extend the privilege to all business information and advice provided to the lawyer or associated with the lawyer's services.[306] The other requirements of the attorney–client privilege apply. Namely, protection would only be afforded to those communications that would directly or indirectly reveal a client confidence or lawyer's legal advice.[307] There is justification for shielding information, opinions, and advice of the expert that are based on client confidential information because, as others have pointed out, they provide opposing parties with "'strong clues' about the absolutely

303. Analyzing the type of service provided does make sense, however, if the court is applying the functional equivalents exception to strategic consultants—which this Article argues against. For example, if the consultant only provides typical consulting services, then it may not be serving as a functional equivalent. *In re* Currency Conversion Fee Antitrust Litig., MDL No. 1409-M-21-95, 2003 U.S. Dist. LEXIS 18636, at *7 (S.D.N.Y. Oct. 21, 2003) (applying a functional equivalents theory and finding significant that the consulting company merely provided standard trade services). Similarly, if the consultants provide advice, this indicates that they are not merely interpreting. United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) (explaining that the narrow interpretation of *Kovel* "excludes the broader scenario in which the accountant is enlisted merely to give his or her own *advice* about the client's situation").

304. *See supra* Part II.A. Further, if the consultants provided legal advice, it would be the unauthorized practice of law. Murphy, *supra* note 12, at 586.

305. Allied Irish Banks v. Bank of Am., 240 F.R.D. 96, 108 (S.D.N.Y. 2007) (concluding that the report and all preparatory work was not motivated by pending litigation or the need for legal advice in part because AIB could not have hired attorneys alone to handle its problems (since its problem was also one of public perception)).

306. Thus, this recommendation is consistent with the policies behind the rejection of an accountant–client privilege. First, it does not, as the Supreme Court was worried about, "insulate from disclosure a certified public accountant's interpretations of the client's financial statements." United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984) (rejecting accountant–client privilege). Second, it is not a client–consultant privilege, but one that applies only when consultancy is necessary for the attorney to provide legal advice—and then only that information that is based on or reveals confidential client information or legal advice is protected. Thus, the conflict that arises when accountants act as both tax advisors and "independent attestors of financial statements" or "protectors of the marketplace" does not exist. *IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Fin.*, 105th Cong. 424 (1998) (prepared statement of Stefan Tucker) (explaining this conflict as one between the obligation to maintain confidentiality and obligation to disclose).

307. United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994). *See supra* notes 68-69 and accompanying text.

protected information."[308] Thus, under the proposed rubric, the external PR consultant's notes in the drug-recall scenario would be protected to the extent that they are based on and/or reveal the legal strategies. Obviously, if a party seeking protection cannot make the showing, all communication, including confidential information, is discoverable.

To a degree, this recommendation is simply the middle ground between the extremes. Indeed, one of the virtues of this nexus test is that it is consistent with the inclination of some federal courts and scholars.[309] Moreover, it addresses the substantive issues with the doctrine. However, the nexus test alone leaves litigants and judges without real guidelines for determining if a nexus exists and if the communication was necessary and in furtherance of legal as opposed to business advice.[310] Furthermore, it may not, on its own, do enough to reign in the use of attorneys as shields against discovery. Therefore, when analyzing whether a nexus exists, courts should *also* consider the following four factors, drawn in part from the doctrine.[311]

3. *Four Factors*

First, the court should consider whether the lawyers were skilled in the

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308. Imwinkelried, *supra* note 10, at 28-31, 45. In his search for a solution to courts' tendency to protect all of a non-testifying expert's information and deny the opposing party the opportunity to depose the expert before trial, Professor Imwinkelried argues that courts should not protect third-party consultation even when that information is derived from and may indirectly reveal client confidences. *Id.* He reasons that the attorney–client privilege is based on common law and does not have a derivative evidence component. *Id.* Nonetheless, arguably it is exactly because of the derivative potential that courts have long protected communications between attorneys and clients when they may only indirectly reveal a client confidence. Indeed, some courts apply the privilege to a lawyer's legal advice if it is merely based on, but does not reveal, confidential information because the confidential information, even if not directly revealed, can be derived. *See, e.g.*, *Neal*, 27 F.3d at 1048; Rattner v. Netburn, No. 88-Civ-2080, 1989 U.S. Dist. LEXIS 6876, at *9 (S.D.N.Y. June 20, 1989), *vacated in part on other grounds*, 930 F.2d 204 (2d Cir. 1991); *see supra* notes 68-69. Moreover, as Professor Imwinkelried admits, a rule that requires courts to parse communications that were only based on client confidences from those that actually disclose them would be laborious, costly, and time consuming. Imwinkelreid, *supra* note 10, at 48. Lastly, Professor Imwinkelried's point is really not that communications between attorneys and third-party experts that indirectly reveal client confidences should not be protected. Instead, it is that the more absolute protection of the attorney–client privilege is not necessary because the work–product doctrine will apply. *Id.* at 37, 49. However, the work–product doctrine only applies in the context of litigation and, as discussed, suffers from other inadequacies. *See supra* notes 147-168 and accompanying text.

309. *See supra* note 298.

310. As discussed, determining whether a communication is in furtherance of legal as opposed to business advice is difficult, and corporate attorneys often dispense both business and legal advice. Solving this problem is outside the scope of this Article. That being said, the factors are designed to aid the court in making the determination.

311. These are not the only factors relevant to determining if there is a nexus, but courts should consider these four factors in addition to other relevant evidence. *See infra* note 363. Multi-factored tests requiring analyses of a nexus between two subjects have been introduced in other areas of law as well. For example, the Supreme Court introduced a nexus test into patent law in 2002. Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 740-41 (2002) (explaining that the presumption of prosecution history estoppel can be rebutted by showing that "the rationale underlying the amendment may bear no more than a tangential relationship to the equivalent in question").

area in which they sought expert assistance.[312] If a company was considering a corporate merger, a court might not find a nexus for communications between a tax consultant and an outside law partner that has specialized in tax and mergers and acquisitions for twenty years. Importantly, this factor is not meant to uncover abuse, but instead to help the court determine necessity.[313]

Second, the court should consider the way that the communication sought to be privileged was conducted or distributed. It is probative if the communication or document was shared only with "top management and any employee whose opinion would be considered by top management before forming a decision."[314] This is a smaller group than that

312. Courts have also considered this factor. *See, e.g.*, Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002) (taking into account that an attorney had twenty years of experience in trusts and estates and, therefore, might not have needed advice from a tax consultant regarding a family trust); *cf. In re* Grand Jury Subpoenas Dated March 24, 2003 Directed To (A) Grand Jury Witness Firm And (B) Grand Jury Witness, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (considering that the attorney did not have PR experience); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) (considering the "significant [tax] expertise" of an in-house counsel in denying privilege protection). As stated, this recommendation does not affect other types of agents, like secretaries or paralegals. This recommendation applies to communications with third-party professional specialists that are consulted for their strategic, content-based expertise. Thus, the fact that an attorney can type does not mean that he or she cannot seek the assistance of his or her secretary in typing his or her briefs.

Some may contend that this recommendation provides incentives to lawyers to be narrow legal specialists. If that is the case, it is in keeping with the trend in legal practice today. *See, e.g.*, VIEW FROM THE TOP: Q&A WITH LAW FIRM LEADERS, CHAIRMEN AND MANAGING PARTNERS 99 (Marcy Lerner et al. eds., 2005) ("I see continuing consolidation and a trend towards specialization in large [law] firms and also in boutique firms."); TORA KAY BIKSON ET AL., THE LABOR MARKET FOR ATTORNEYS IN THE STATE OF CALIFORNIA: PAST, PRESENT, AND FUTURE 8 (2003), *available at* www.rand.org/pubs/monograph_reports/2007/MR1710.pdf ("A defining feature of the legal profession is the scope of specialization within the field."). Moreover, if a lawyer becomes especially skilled in an area, he or she may be able to competently handle the matter without sharing confidential information with a third-party consultant also skilled in that area. Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625, 635 (1994) ("The more lawyers know about science, technology, economics, psychology, management, and other matters affecting their clients' interests, however, the more value lawyers will be able to add to their clients' activities."). The counter-argument, however, is that this recommendation enables or incents attorneys to be generalists. If attorneys are not specialists in an area, then there is a higher likelihood that consultation with a third-party consultant will be viewed as necessary by a court. Further, because the recommendation permits consultation with third-party consultants in other disciplines, it helps a lawyer provide informed legal advice that is not detached from business concerns and is arguably more relevant to corporate clients.

313. On these same lines, a court might also consider the capability of internal staff. *Cf. In re* Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 219-20 (S.D.N.Y 2001) (deciding external PR consultants were functional equivalents because, *inter alia*, internal PR resources were "insufficient"); Richmond, *supra* note 12, at 399 (explaining that based on doctrine, the privilege "is more likely to attach where a client does not have in-house public relations capabilities"). That is, if the company has an internal PR group, this may negate the necessity of talking with an external PR consultant. However, those in favor of outsourcing argue that outside consultants do not replace but instead compliment and help train internal staff. Rosen, *supra* note 28, at 648.

314. Hayes v. Burlington N. & Santa Fe Ry. Co., 752 N.E. 2d 470, 473 (Ill. App. Ct. 2001) (describing a similar test for the control group test); Sexton, *supra* note 2, at 503-04

traditionally covered by the Supreme Court's broad *Upjohn* decision.[315] Limiting the distribution in this manner helps show that the communication was primarily in furtherance of legal advice and not to protect unprivileged information from discovery.[316] As one court explained, it also helps ensure that "the mere receipt of routine reports by the corporation's counsel will not make the communication privileged."[317] Courts should also consider the form of the communication and whether the substance was communicated by other methods to non-lawyer corporate employees. In the drug-recall scenario, the fact that the trials were previously distributed to others in the same form suggests that perhaps the client was not seeking legal advice from the lawyer about the trials themselves. On the other hand, evidence that other methods were used supports the contention that the attorney was involved to secure legal services and not to shelter otherwise discoverable information.[318] In the drug-recall hypothetical, the external PR consultant provided a document to the lawyers that presented PR advice based on potential litigation strategies. The lawyers used this information to provide legal advice to

(recommending that confidentiality be preserved "where the attorney shares the information with those empowered to make legal decisions for the corporation").

315. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981). *Upjohn* required that communications be kept "highly confidential," which as discussed, *supra* in note 66, has been interpreted as a fairly broad "need to know" standard. *See, e.g.*, FTC v. GlaxoSmithKline, 294 F.3d 141, 147 (D.C. Cir. 2002) ("The Company's burden is to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein.").

316. The Supreme Court's concern that the control group "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys" is absent here because this recommendation is about lawyers communicating with third-party specialists. *Upjohn*, 449 U.S. at 392. Professor Lonnie T. Brown recommends that courts adopt a similar approach to attorney–client privilege law in general. Brown, *supra* note 63, at 953 (defining the "control group" based on Model Rule of Professional Conduct 4.3 because it is "as close as possible to articulating a true corporate analog for the individual client paradigm"). He argues that using this control group "narrow[s] the scope of the corporate attorney-client privilege so as to protect the sort of information that the privilege was originally designed to cover, as well as that which corporations desire most to be kept confidential, such as legal advice from counsel or incriminating communications from senior management to corporate counsel." *Id.* at 907. Paul Rice, however, argues that the presence or absence of confidentiality does not further or detract from the purpose of the attorney–client privilege, and that it is inefficient to inquire into whether distribution was appropriate. Paul Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 888, 890 (1998). He proposes that the confidentiality component to the attorney–client privilege be abolished in favor of a standard that protects all communications between attorneys and clients regardless of third parties as long as the court determines that the communication was made in good faith and that it is fair to the parties to protect it. *Id.* at 888, 893. This proposal, however, is problematic. First, it greatly expands the privilege. Any third party privy to attorney–client communications could not be compelled to reveal the communication. Second, it enables litigants to pierce the attorney–client privilege based on an equity analysis, which makes protection even more equivocal and likely affects behavior *ex ante*.

317. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977).

318. *In re* Buspirone Antitrust Litig., 211 F.R.D. 249, 254 (S.D.N.Y. 2002) (considering this factor in the context of internal employees); *cf. In re* Air Crash Disaster, 133 F.R.D. 515, 519-20 (N.D. Ill. 1990) ("If the lawyer is acting merely as a custodian, for example, there is no privilege attached to the communication.").

the client. Assuming the PR document was not mass distributed, there is less worry about the potential for abuse than if the general counsel had simply distributed the document as "the" legal advice.

Third, the court should consider, as some courts do, whether there is "contemporaneous documentary proof supporting [either party's] interpretation of the facts."[319] For example, the consultation should relate to the consultant's specialty *and* contract.[320] If an accountant provides advice to the lawyer about the accountant's former client to aid in litigation against the former client, such communication should not be protected. Further, although form should not be elevated over substance, the fact that the lawyer is present at the meeting,[321] that the document specifically requests legal advice,[322] that there is a separate bill or retainer agreement for the project, or that there is an already existing lawsuit on the matter[323] support the proponent's nexus contention.[324] Admittedly, this factor is extremely fungible.[325] However, requiring attorneys to formalize the relationship in some way raises consciousness around the privilege and its parameters. It requires attorneys to be cognizant of and more diligent about the decision to share confidential information with third-

319. United States v. Adlman (*Adlman I*), 68 F.3d 1495, 1500 n.1 (2d Cir. 1995).

320. This ensures that ordinary fact witnesses are not designated consultants in order to garner shelter. *See supra* notes 104-08 and accompanying text for more discussion. Alexander, *supra* note 14, at 321 n.433 (critiquing a case because it enabled parties to "convert mere witnesses into sources of privileged information simply by designating them litigation consultants"). Although it has not been followed by all courts, *Upjohn* requires this type of connection for employees. *Upjohn*, 449 U.S. at 394-95 (requiring that "communications concerned matters within the scope of the employees' corporate duties"); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970) (per curiam). The old subject matter test also required this type of connection. *Diversified Indus., Inc.*, 572 F.2d at 609 (explaining that such limits prevent protection to any employee that "functions merely as a fortuitous witness").

321. *But see In re* Grand Jury Subpoenas Dated March 24, 2003 Directed To (A) Grand Jury Witness Firm And (B) Grand Jury Witness, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003) (announcing that privilege could extend to communications between a client and a third party without the presence of an attorney if directed by attorney). *See infra* note 329 and accompanying text.

322. Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977) ("It is not essential, however, that the request for advice be express. Client communications intended to keep the attorney apprised of continuing business developments, with an implied request for legal advice based thereon, or self-initiated attorney communications intended to keep the client posted on legal developments and implications may also be protected.").

323. Arguably, this factor would also help prove work-product protection. As discussed above, however, because the work-product doctrine is distinct from the attorney-client privilege, there are situations where attorney-client privilege protection would be sought in addition to or in lieu of work-product protection. *See supra* Part II.D.

324. *Cf.* United States v. Adlman, 68 F.3d 1495, 1500 n.1 (2d Cir. 1995) (rejecting attorney-client privilege protection based, in part, on the fact that the client's billing statements did not separate the accountant consultant's work done to help the lawyer from other accounting and advisory work provided by the accountant to the client generally).

325. Application of this factor may result in manipulation like that described below in note 332. However, this is generally true of formal requirements. Moreover, there is a cost to manipulation. It requires multiple people to evade the law, which makes it more likely that someone will refuse to cooperate or blow the whistle. Finally, this factor is one of several. The absence or the presence of one of these formal indicators is not determinative.

party consultants and to delineate when they are wearing their legal hat.[326]

Last, a court should consider the substance of the law involved. If the legal issue implicates a great deal of facts or is very complex and hinges on highly specialized knowledge (like corporate securities laws), this may support necessity.[327] Additionally, if the cause of action is bound up in the type of services provided by the consultant, this may support a nexus argument. For example, a nexus between consultation with a PR executive and the provision of legal advice is more substantiated if the case is one of defamation, libel, or slander than one seeking damages for failure to comply with the Consumer's Legal Remedies Act.[328]

As long as the litigants know beforehand that the presence of these issues will support a nexus, there is no inequity. Importantly, their absence does not necessarily indicate lack of nexus. For example, requests for legal advice can be implied, and one can imagine circumstances where the lawyer would direct the client to relay information directly to the third-party consultant and not see the need to be present (or bill the client for the time).[329]

Courts have considered a few factors in the past that this Article contends should *not* be considered because they serve as artificial distinctions. For example, that there is a prior consulting relationship between the client and the third-party consultant should *not* be a factor for or against a nexus.[330] It is precisely because of the prior or existing relation-

326. Other scholars have recommended that attorneys take formal steps to preserve confidentiality and the privilege. *See, e.g.*, Chambliss, *supra* note 54, at 1732 (recommending that firm counsel "bill the firm for time spent on in-house advising" to "underscore [the] separation and the firm's identity as the client" and to preserve privilege when relying on in-house law firm counsel).

327. This is similar to the agency theory's original justification. *See supra* notes 74-76 and accompanying text.

328. Moses, *supra* note 15, at 1836 n.134 ("Libel is an area in which legal spin control may be the basis of the entire case. Libel cases are about damage to public image; the case itself may be designed to resurrect the image of the plaintiff in the public eye. Any way to get the press to pay attention to the plaintiff's position arguably advances the goals of the client.").

329. *See supra* note 321; *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed To (A) Grand Jury Witness Firm And (B) Grand Jury Witness, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003) (protecting communications between client and PR firm when a lawyer was not present as long as the lawyer directed the client to reveal confidential information to PR the consultant and it was for purpose of obtaining legal advice from the lawyer); *see also* United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (explaining that a lawyer's physical presence is not necessary); United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1048 (E.D.N.Y. 1976) ("[T]here can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's presence while the client dictates a statement to the lawyer's secretary . . . .").

330. *But see* United States v. Adlman (*Adlman I*), 68 F.3d 1495, 1500 n.1 (2d Cir. 1995) (emphasizing the prior consulting relationship with client); Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002) ("[W]hen a party hires an accountant to provide accounting advice, and only later hires an attorney to provide legal advice, it is particularly important for the party to show that the accountant later acted as an agent necessary to the lawyer in providing legal advice.").

ship that the consultant's advice may be valuable. Moreover, the communication should be no less protected simply because the client or in-house attorney, rather than the outside attorney, hires the consultant.[331] Today, the general counsel is generally the hub of any legal controversy and is in charge of the outsourcing decisions. Considering who hires the consultant or whether there was a prior consultant relationship puts form over substance.[332] Additionally, it negates the purpose of the third-party attorney–client privilege doctrine, which is to protect communications that are necessary to the lawyer's ability to render legal services (and that directly or indirectly reveal a client confidence or legal advice) regardless of the formal relationship to the client.[333]

Lastly, the judge need not attempt to determine if the communication would not have occurred *but for* the client's need for legal advice or legal services.[334] Although a positive answer to this question is fairly strong support for the nexus, it is problematic. As Federal Rule of Evidence 501 urges, the privilege should be interpreted "in light of reason and experience."[335] Large corporations conduct business by multidisciplinary teams made up of internal and external consultants.[336] These teams meet for multiple purposes that intertwine. Legal risks often cannot be understood independent of business risks.[337] Thus, in many circumstances it would be next to impossible to determine if the communication would

331. *In re Grand Jury Subpoenas*, 265 F. Supp. at 325-26. *See also Cavallaro*, 284 F.3d at 331 (explaining that communications would not be privileged if the PR firm had been hired by the client directly and acknowledging the "artificiality" of this distinction in order protect "effective operation of the privilege"); Gruetzmacher, *supra* note 12, at 989 (explaining that cases that require a consultant to be hired by a law firm or a client to hire a law firm first "epitomize form over substance, and have done nothing but create uncertainty and confusion in an area of the law in which certainty is crucial").

332. Indeed, many of the interviewees mentioned that, although the general counsel was the ultimate hiring manager, the lawyers structure it so that the outside law firm hires the external consultant to try to ensure privilege protection. *See, e.g.*, Interview with General Counsel #2, *supra* note 157 (explaining that the law firm formally hires the external consultant and attempts to put in the "right" contract language to garner privilege protection); Interview with PR Executive #50, at 4 (April 7, 2008) (on file with author) ("Sometimes, more than sometimes, we will be retained by outside council in order to protect privilege. But in most of those cases, well, our contracts with the outside council, the contract will stipulate that the cost will be borne directly by the client.").

333. Chore-Time Equip., Inc. v. Big Dutchman, Inc., 255 F. Supp. 1020, 1023 (W.D. Mich. 1966) ("The admission of non-lawyers into the field of patent practice is not a sufficient reason 'for breaking down well recognized and soundly based rules affecting the claim of privilege.'" (quoting Ellis-Foster Co. v. Union Caride & Carbon Corp., 159 F. Supp. 917, 920 (D.N.J. 1958))).

334. *See, e.g.*, First Chicago Int'l v. United Exch. Co., 125 F.R.D. 55, 57 (S.D.N.Y. 1989) ("[C]laimant must demonstrate that the communication would not have been made but for the pursuit of legal services." (quoting Sexton, *supra* note 2, at 492)); *see also*, United States v. Adlman (*Adlman II*), 134 F.3d 1194, 1198 (2d Cir. 1998) (recommending a "but-for" and "because of" test in the work-product doctrine context); Sexton, *supra* note 2, at 459, 490.

335. FED. R. EVID. 501.

336. *See supra* notes 28-31 and accompanying text.

337. Rosen, *supra* note 28, at 659.

not have occurred *but for* the need for legal advice.[338] The nexus test avoids such problems of proof. Consider the drug-recall scenario. That the attorney needed the input from the PR consultants in order to provide the effective legal services is more than plausible,[339] but there was also a business need.[340]

B. Analysis

The following section analyzes this Article's recommendations based on those first principles identified above.

1. Zone of Secrecy and Corporate Misconduct

Critics of the corporate attorney–client privilege in general, and specifically of its application to third-party consultants, contend that "corporations will attempt to funnel [more] corporate communications through their attorneys in order to prevent subsequent disclosure."[341] This risk likely grows with the scope of the doctrine. Further, scholars argue that when corporations know that something will not be discoverable, they are more likely to misbehave.[342] These concerns are valid. The public could end up with less information or worse, it could be misled—as it may have been by tobacco companies.[343] Admittedly, protection of consultation with third parties as recommended in this Article's proposal might cover up matter that would have been discoverable under a narrow *Kovel* theory.[344] For example, it would likely protect the notes taken by the PR consultant in the drug-recall scenario while the narrow interpretation of *Kovel* would not. Hypothetically, it might also protect discrete scientific studies conducted at the behest of lawyers to determine if current product label disclosure is adequate (presuming the results disclose confidential

338. Sexton, *supra* note 2, at 492 ("[D]ifficulties of proof [are] associated with any demonstration of subjective motivation. . . ."). Professor Sexton believes that corporate employees should not "have to demonstrate that the communication would not have been made but for the existence of the privilege" because of the inherent problems of proof associated. *Id.* at 492. Still, he argues that in order for the corporate attorney–client privilege to apply, *Upjohn* requires that the communication to the attorney would not have been made but for the contemplation of *legal services*. *Id.* More analysis needs to be done, however, to determine whether these same problems of proof occur with this "but for" test as with the one he argues against.

339. *See supra* notes 33-40 and accompanying text.

340. In the work–product context, this same type of test proves malleable and unpredictable. *See supra* Part II.D.

341. *In re* Feldberg, 867 F.2d 622, 627 (7th Cir. 1988) ("Litigants may use secrecy to cover up machinations, to get around the law. . . ."); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977).

342. *See supra* note 241.

343. *See supra* note 15.

344. It is difficult to quantify the impact of this recommendation since application varies. As mentioned *supra*, courts within the same district have applied a narrow and broad standard. Moreover, some courts that apply the narrow standard find that it covers third-party consultation even when the third party does more than translate. *See supra* note 91. My standard protects any communication that would be protected under the narrowest interpretation of *Kovel*.

client communication and/or legal advice).[345] Importantly, this test is not as inclusive as the broadest interpretations of *Kovel* because the proponent has to show not just that the communication was in furtherance of legal services, but that it was *necessary* for them. Further, it constricts the availability of blanket protection in those situations where third-party consultants, like those in the drug-recall scenario, might be deemed functional equivalents[346] because it does away with the functional equivalents test for third-party strategic consultants. Because it is narrower than the broad approach, it may discourage the type of aggressive interpretation to the attorney–client privilege applied by the tobacco lawyers.[347]

As discussed, under the narrowest interpretation of *Kovel*, none of the communications in the drug-recall scenario would be protected, but under the broadest interpretations of *Kovel* or the functional equivalents test, all of them could be. Under the multifactored nexus test, neither would be the case. The documents detailing the external PR executive's recommendation on the best media response would not be protected because they were not necessary for the lawyer to provide legal advice. The clinical trials conducted by the external scientists would also not be protected. Although understanding the drug's side effects is nice to know, and the lawyer is likely not a trained scientist, it does not appear that the studies were conducted so that the attorney could provide legal advice back to the client.[348] Instead, it seems they were originally conducted to determine the drug's efficacy and were not sent to the lawyer for legal advice. Moreover, they may have been distributed to more than just those employees able to impact the decision-making.

As the Supreme Court recognized in *Upjohn*, "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[349] Thus, plaintiffs in many cases will not end up having less access to the information they need to bring suit. They simply will not be able to use the defendant's own words to prove what they should otherwise be able to

345. Preexisting documents are not subject to attorney–client privilege protection. Brown, *supra* note 63, at 916. Therefore, if studies were already done and ordered for business purposes, the corporation cannot protect them by sending them to the attorney. They are only coverable if the attorney requests them in order to provide legal advice. Further, the underlying facts or results of the study are discoverable by other means. *Id.*

346. Courts have found external PR consultants, like the one in the drug-recall scenario, to be functional equivalents. *See supra* Part II.B.2 and notes 248-250.

347. *See supra* note 242.

348. *Cf.* Burton v. R.J. Reynolds Tobacco Co., 177 F.R.D. 491, 497 (D. Kan. 1997) (denying privilege because the party did "not point to any specific . . . that the documents were created to give legal advice instead of for general business purposes, nor [that] the documents themselves evidence the necessary link").

349. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981); H.W. Carter & Sons, Inc. v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *3-4 (S.D.N.Y. May 16, 1995) ("An attorney may not be compelled to disclose communications made to him or her by a client, even where those communications contain purely factual material. Nor may an attorney be compelled to disclose facts that he or she learns from a client. The *client*, on the other hand, may be required to disclose the underlying facts (although not the communications to counsel).").

establish by discovery. The facts are discoverable by other means.[350] As the Eighth Circuit explained, when litigants fail to learn that which is privileged, it is often "simply due to their own failure to ask the proper questions."[351]

2. *Compliance, Informed Decision-Making, and the Spirit of the Doctrine*

Admittedly, as compared to the narrow approach, the recommended approach presents a cost to the public's access to information. But shielding this information promotes compliance and informed decision-making in the same way that protecting attorney-led internal investigations does. That is, an attorney may be better able to investigate whether a corporation is complying with trading laws with the help of an external financial consultant. Or, armed with the information that a PR executive can provide about the potential spin of a legal course of action, a lawyer may be better able to counsel the client against doing something that is technically legal, but risky.[352]

However, the recommended approach is less expansive than the broad approach to the agency exception and the functional equivalents test. It requires that the consultation be necessary to the provision of legal services, which is in sync with the spirit of *Kovel*, the original decision that provided an exception to the waiver for third-party consultation. This is likely why some courts and scholars infuse necessity into the standard.[353] Given that this approach requires necessity and an analysis of four factors, it might reduce corporations' and lawyers' use of external consultants as compared to the broad approach. Because protection will be lost, attorneys will abstain if they do not believe that the communication is necessary to render legal services. This lack of certainty may, therefore, "chill" consultation. Arguably, however, it does so in a way that comports with the spirit of the doctrine. Attorneys will only seek the help of third-party consultants when they really, *really* need it—as opposed to when they think it just *might maybe* help them somehow.[354] So, for example, in the drug-recall scenario, had the lawyer already decided to pull the drug, admit responsibility, and preemptively settle the cases, but wanted to know how the external PR consultants would handle the PR, he or she would abstain from candid, open consultation with the external PR consultant. John E. Sexton argues against necessity tests in the employee context because of this chilling effect.[355] Here, however, the

350. *See supra* notes 68-69 and accompanying text.
351. *In re* Bieter Co., 16 F.3d 929, 941 (8th Cir. 1994).
352. *See* Beardslee, *Advocacy Part I*, *supra* note 6, at 45-46.
353. *See supra* note 298.
354. *Cf.* Sexton, *supra* note 2, at 495 (arguing that communications with employees should be privileged when the employees "reasonably could have believed . . . that the content of the communication related to the legal services").
355. *Cf. id.* at 482 ("[A]n inability to forecast accurately whether a claim of privilege will be recognized by courts will chill communications."); *id.* at 495.

party required to determine whether the communication is important to legal services is the attorney—not the client. Significantly, the chill is not as disconcerting in this context because it is one step removed from the attorney–client privilege sweet spot, that is, communication between attorney and client.[356] While this test may force attorneys to make the necessity calculation before they can really know the answer (a classic chicken–egg problem), attorneys can (and already do) consult with external third parties hypothetically—without discussing information they want to remain privileged.[357] This is not the ideal way to consult with a third-party specialist, but it is sufficient in those situations where the attorney suspects that consultation would waive the privilege.

Moreover, corporations will arguably still hire external consultants. The difference will be that corporate employees will only share confidential information with them when the attorney believes it is necessary for competent legal advice or when the client believes it is worth the risk regardless.[358] That said, given that this proposal does away with the functional equivalents exception for strategic consultants, corporations' propensity to treat external consultants like internal employees may be reduced. However, this may enable third-party consultants to perform an informal regulatory function for the corporation. As discussed, third-party consultants on internal crisis teams may serve a gatekeeping role.[359] Arguably, the less these consultants are treated like and feel like regular employees, the lower the risk that they will become less objective and the higher the odds they will be able to play that gatekeeping role.[360]

3. *Predictability/Clarity*

Given that the multifactored nexus test utilizes one standard, it is more predictable than the current doctrine (which incorporates three standards with varying interpretations). That said, the proposed multifactored

356. Third-party consultants that might have been deemed functional equivalents of the client are not "real" employees of the client. *See* discussion *supra* Parts II.B.3. Therefore, this test does not chill communications between *client* and attorney.

357. Many of the general counsel interviewees that were so concerned about protection of the privilege mentioned that they tried to limit exposure of client secrets by speaking to the external PR consultants hypothetically.

358. Just as attorneys warn corporate clients that they represent the corporate entity and not the officers or employees, they should also warn the client of the risks associated with consulting candidly with third-party consultants. Bruce A. Green, *Interviewing Corporate Client Officers and Employees: Ethical Considerations*, PROF'L LIAB. LITIG. ALERT, Winter 2005, at 1, 3 (noting that lawyers should and do provide these types of warnings); *see supra* note 190.

359. *See supra* notes 225, CITE ID="_REF212533028">-263 and accompanying text.

360. The importance of gatekeepers in today's legal corporate environment can not be over emphasized. *See supra* note 224. As Milton Regan explains, law firms are driven by the market and, therefore, external lawyers may be "both less willing and less able to insist that corporate clients give weight to interests beyond those of shareholder wealth maximization." Regan, *supra* note 15, at 938; *cf.* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 871 (1992) ("Because of the financial and other rewards of a 'cutting edge' corporate legal practice, the fear of liability in this context is not sufficient to deter even clearly questionable conduct, let alone legitimate advice that might be made to appear questionable after the fact.").

nexus test is not nearly as predictable as a bright-line rule or a very narrow or very broad interpretation of *Kovel*.[361] Moreover, it entails transaction costs.[362] However, this Article contends that the recommended multifactored nexus test lends sufficient clarity and consistency to the process in a way that maximizes the other, arguably more important, normative criteria.

First, it is not a naked standard. It includes four factors that harness the analysis.[363] Second, although there is a need for more certainty than that provided by the current regime, attorneys work within a probabilistic universe.[364] Therefore, the level of certainty required in order to enable external consultation may be less than that provided by a bright-line rule. As Professor Timothy Glynn argues, "the level of certainty required" for the privilege to promote candor and communication "most likely varies by client and circumstance."[365] Based on preliminary findings from the PR Study, it appears that in this context, the *possibility* of coverage is quite different than the complete absence of it. And the decision to share information is a calculated risk.[366] Thus, although attorneys claim they will abstain from consultation if they *know* their communications will not be protected (as under the narrow theory), they do not need definitive protection to justify consultation with third-party consultants.[367]

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361. There are obviously costs associated with taking into account the context surrounding the communications. *Cf.* Wilkins, *supra* note 360, at 878 (explaining that "[d]etermining contextual differences takes time and can lead to the point where it becomes necessary to treat every case as unique"). However, these costs exist currently under any interpretation of the exceptions and are arguably streamlined with this recommendation.

362. In addition to costs associated with administering the test in court, there will be costs associated with putting together privilege logs. However, many courts already require particularized privilege logs. *See, e.g.*, FTC v. GlaxoSmithKline, 294 F.3d 141, 145 (D.C. Cir. 2002). Moreover, knowing the standard and factors that will be considered by a court may induce attorneys to keep more careful records of communications as a matter of due course, which is something they may not do if the rule is extremely vague or narrow. *See supra* notes 211-17 and accompanying text.

363. My recommendation harnesses the range of what David B. Wilkins refers to as "substantive tilt." Wilkins, *supra* note 360, at 811; *supra* note 287. The factors work to some extent like rules in that they "allocate the limited decisional resources of individual decision-makers, focusing their concentration on the presence or absence of some facts and allowing them to 'relax' with respect to others." Schauer, *supra* note 287, at 146.

364. Also, they understand that the facts of the controversy are likely to be exposed. Interview with General Counsel #60, at 28 (July 23, 2007) (on file with author). ("In today's environment, you know, with an employee population of young bright enlightened individuals, it's a rare person who believes that a corporation can keep a secret especially if its got some community or regulatory impact").

365. Glynn, *supra* note 14, at 82.

366. Interview with Law Firm Partner #55, *supra* note 33, at 18 ("It's all a balance of the risks.").

367. Interview with General Counsel #2, *supra* note 157, at 20-23 (explaining that he is "more frank in his conversations because of the possibility of coverage" but that there would be less communication and a larger wall between PR and Legal without the possibility of coverage). A minority of interviewees mentioned that, although they try to preserve the privilege, attorneys are sometimes willing to take the risk of exposure in order to get the external advice. Interview with General Counsel #17, at 40 (Feb. 6, 2007) (on file with author); Interview with General Counsel #27, at 9 (Feb. 26, 2008) (on file with author) ("It's difficult to speak in generalities, but I would say that although it's important to pro-

Third, in addition to adding some clarity that informs behavior *ex ante*, this proposal also informs behavior *post hoc*. Litigants know what type of proof to submit to support a claim of privilege, which may decrease frivolous claims. And courts know which factors are important to the analysis. As such, the multifactored nexus test will lead to better analyzed opinions because it centers the inquiry on the type of service the *attorney* provides, as opposed to that provided by the third party.[368] And it streamlines the analysis. Although many judges write as if there is only one standard, they often spend time justifying the standard they apply.[369] Under the multifactored nexus test, the court will not waste energy justifying the theory it applies. Third, although this test does not specifically delineate legal from business advice—a likely impossible task[370]—it provides some factors to inform the determination and it forces the litigants and judges to be more particular—a rigor currently absent from the analysis. Thus, it prevents judges from hanging their hat on one factor, as they sometimes do.[371] In those instances, the nexus test may not change the end result, but it would change the quality and depth of analysis. In addition to considering formal documents, courts still have to consider the substance of and the circumstances surrounding the actual communications. They have to dig into the facts of the case—which is exactly how the attorney–client privilege should be decided—case by case.[372] Therefore, a court will still be able to deny protection if it suspects that attorneys are acting as mules to protect what should be discoverable. Thus, although clarity and predictability are of concern and any recommendation should strive to increase these dimensions, as this one does, analysis of the attor-

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tect the privilege that's not always the driving factor in terms of how you go about things. There are other considerations."); Interview with Law Firm Partner #40, *supra* note 60, at 19 (explaining that sometimes "it's more important to get good PR legal advice coordinated and privilege be damned."). However, even in these situations, there exists the possibility of coverage.

368. Analyses that deny protection because the consultant failed to provide legal advice or special consultancy advice would not occur. *See supra* notes 138-46 and accompanying text.

369. *See, e.g.*, Tri-State Outdoor Media Group, Inc. v. Official Comm. of Unsecured Creditors to Tri-State Outdoor Media Group, Inc., 283 B.R. 358, 362 (2002) (focusing the discussion on *Kovel* and its progeny and distinguishing *Ackert* to justify protecting communications between the law firm and the financial consultant hired by the law firm to help negotiate the financial restructuring).

370. Indeed, as a profession we lack consensus on what are "full and complete legal services," "good decision making," and "legal advice." Therefore, this recommendation unavoidably suffers from some of the same problems associated with the attorney–client privilege in general. The hope is that it will limit the number of times that the privilege is wholly lost by lawyers seeking help from business consultants when it is necessary to provide fully informed, integrated, legal services to the client.

371. In *Tri-State*, the law firm hired a financial consultant to help negotiate its financial restructuring. *Tri-State*, 283 B.R. at 361. The court decided the attorney–client privilege protected communications between the lawyer and the financial consultant based on one factor, the engagement letter. *Id.* at 363 (finding that work–product protection applied but was ultimately waived because the consultant was a testifying expert witness).

372. Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 324 (7th Cir. 1963) (explaining that corporate attorney–client privilege matters have to be resolved on a "case-by-case basis").

ney–client privilege has always been and should remain intimately tied to the facts of each case.

4. Other Considerations

Likely, those most opposed to this Article's proposal will question why corporations should not have to shoulder the costs of third-party consultation, that is, the risk of reduced privilege protection. They will ask why the attorney–client privilege should change to accommodate corporations' business needs,[373] why attorneys should be encouraged to incorporate non-legal considerations in the provision of legal advice. The answer to these questions is three-fold. First, under this Article's recommendations, corporations do have to shoulder the cost to a degree. If they want the most protection possible, they have to tighten their "porous borders," that is, they have to hire the third-party consultant as an employee.[374] They can no longer rely on the functional equivalents test for shelter. Second, as discussed, external consultants may actually play a role in identifying and managing risks for corporations that lawyers may not.[375] If the point of reference is malfeasant corporate directors, then third-party consultants may be seen as "aiders and abettors." On the other hand, if the assumption is that the corporate directors desire to comply with the law, protecting some communications between lawyers and third-party consultants is more palatable.[376] Third, if it is true that lawyers can sometimes provide better legal advice to their clients with open third-party consultation, protecting such communication serves the interests not only of clients, but also the public and the legal profession. As discussed earlier, in order to stay relevant and continue to add value to clients, lawyers need to approach problems holistically. [377]

373. For an argument that the corporate attorney–client privilege should expand as the scope of legal practice expands and should protect non-legal components of attorney communications that are intertwined with communications made primarily to attain legal advice, see generally Sisk & Abbate, *supra* note 45.

374. Admittedly, this may disadvantage those corporations that are smaller and cannot afford to have internal staff on the matter. That said, this would arguably support the attorneys' contention that the communication with the external consultant was necessary. *See supra* note 250.

375. *See supra* notes 225, 262-263 and accompanying text.

376. The general counsels in the PR Study often asserted that they and their clients tried to comply with the law even if there was little risk. *See, e.g.*, Interview with General Counsel #42, *supra* note 50 ("Because day-to-day we try to comply with the law. As a general counsel of this company I was always involved in important disclosures to the markets because it's my lawyers' job to make sure that the statement is as clear and as accurate and balanced for investors as possibly it can be. So, one input is sort of, are we doing this the way SEC structured and unstructured disclosure would have us do it. We try to comply with the law not just because we could get sued if we don't. My client[s] say to me, use this disclosure consistent with your understanding of the securities law. So, that's what in-house lawyers do all the time."); *see supra* note 224.

377. *See supra* Parts I and II.C and note 299. Arguably, this is also important for attorneys' livelihood. Sisk & Abbate, *supra* note 45, at 21 ("Appreciating the attorney-client privilege as dynamic in nature requires that we open our eyes to the changes in the services provided by lawyers as part of legal representation in today's society."). Some might contend that this proposal increases the power and influence of the general counsel because

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Although this Article's proposal does not perform better on all criteria as compared to a very broad or very narrow approach, it performs overall as well or better on most. Although still subject to interpretation, which might produce varying results, the multifactored nexus test recommended in this Article will provide slightly more predictable protection to third-party consultation in a way that balances the search for truth with the need for confidential communications between attorneys and third-party consultants. Unlike the narrow approach, the nexus test embraces the role third-party consultation plays in the provision of legal advice to large corporations. Unlike the broad approaches, it prevents the ease with which corporations can funnel communications unrelated to legal services through attorneys for protection. Last, this test encourages better, more streamlined analysis. Even if reform fails to change the quality of analysis, a set of norms will be elaborated by common law to guide attorneys' interactions with third-party consultants.[378]

CONCLUSION

In today's increasingly complex and regulated marketplace, corporations rely on third-party consultants to conduct business. Therefore, attorneys sometimes have to consult openly with these third-party consultants in order to provide fully informed, competent legal advice and services to their corporate clients. The primary thesis of this Article is that there should be privilege protection for some exchanges between attorneys and third-party consultants. The secondary thesis is that, as a means to that end, the attorney–client privilege doctrine ought be revised so that it protects these exchanges when they are truly necessary but does not create a huge zone of secrecy against discovery. Therefore, this Article makes some specific recommendations as to how the attorney–client privilege could be modified to achieve this end. However, there are likely other adequate means to achieve the same result.[379] For example,

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the general counsel is the one who decides when it is necessary to talk to external consultants. However, under both the broad and narrow approaches that exist today, it is the attorneys that decide when outside consultation is necessary for the provision of legal advice. Moreover, corporations will still have business reasons to seek outside experts.

378. *Cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 771 (1975) (Blackmun, J., dissenting) (arguing for a nexus test over a bright line rule in the context of 10-b5 claims and explaining that "[s]ensible standards of proof and of demonstrable damages would evolve and serve to protect the worthy and shut out the frivolous"). One question left unaddressed is how this recommendation will be implemented. One possibility is that an appellate level court or even the Supreme Court, when presented with the appropriate case, will decide to enact changes to the doctrine similar to those proposed here. The other option is change by legislation.

379. Because the attorney–client privilege is an exception to the general rule that all information should be discoverable and was originally confined to communications between attorney and client, some readers might find it difficult to characterize communications between lawyers, clients, and third-party consultants as attorney–client communications and may be reluctant to use the privilege as the vehicle to protect these communications.

the work–product doctrine could be expanded to cover communications between lawyers and third-party consultants irrespective of the prospect or the existence of litigation.[380] What is important is that the right result is achieved. This Article has argued that the right result will flow from a solution that seeks to increase deterrence, decrease a zone of secrecy, enable informed decision making, increase compliance, comport with the spirit of the privilege doctrine, and provide increased clarity over the current regime. However, even if there is disagreement as to the importance of these dimensions, there is still value to this exercise. The issues addressed in this Article are connected to larger questions facing the legal profession today such as: What comprises full and complete legal services? How should the distinction between law and business be made? What is the value of the attorney–client privilege given the work–product doctrine? And should the corporate attorney–client privilege grow with corporate practice? Moreover, at the very least, this Article identifies issues with the current doctrine. The hope is that it will encourage further discussion and change.

380. California has expanded the work–product doctrine to unconditionally cover attorneys' "impressions, conclusions, [and] opinions," but this expansion only applies to written materials and only applies to attorneys' work product. *See, e.g.*, CAL. CIV. PROC. CODE § 2018.030 (West 2007) ("A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances."); Rumac, Inc. v. Bottomley, 143 Cal. App. 3d 810, 813 (1983) ("There is also no valid reason to differentiate between the writings reflecting the private thought processes of a lawyer acting on behalf of a client at the beginning of a business deal and the thoughts of a lawyer when that business deal goes sour with resultant litigation."); Williamson v. Superior Court of L.A. County, 582 P.2d 126, 129 (1978) ("Accordingly, [the California Code of Civil Procedure] affords a conditional or qualified protection for work product generally, and an absolute protection as to an attorney's impressions and conclusions.").

Casenotes


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